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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 623

AMERICAN CAR AND FOUNDRY COMPANY,
PETITIONER,

vs.

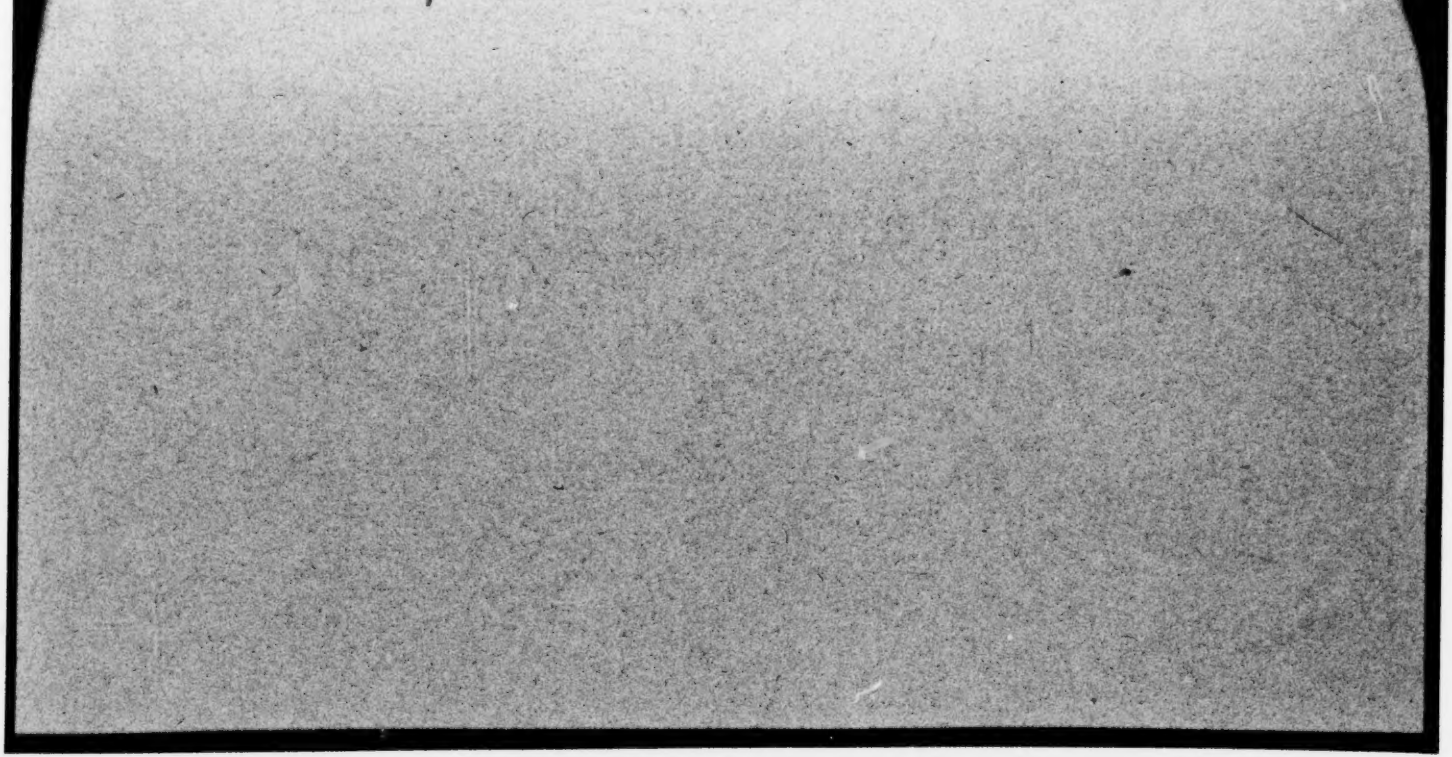
H. A. BRASSERT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 13, 1933

CERTIORARI GRANTED FEBRUARY 13, 1933

(37,320)



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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable George A. Carpenter, District Judge of the United States for the Northern District of Illinois on 30th day of November, in the year of our Lord one thousand nine hundred and thirty-one, being one of the days of the regular November Term of said Court, begun Monday, the Second day of November, and of our Independence the 156th year. Placita.

Present:

Hon. George A. Carpenter.
H. C. W. Laubenheimer, U. S. Marshal.
Charles M. Bates, Clerk.

PAGE CUT

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

American Car and Foundry Company, a corporation
vs.
H. A. Brassert
} No. 39707

Be It Remembered, that the above-entitled action was commenced by the filing of the following Libel in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 6th day of July, 1931.

July 6, L. 3 * * (Caption) * *

To the Honorable Judges of the District Court of United States for Said District:

The libel of American Car and Foundry Company, a corporation, against H. A. Brassert in a cause civil and maritime, alleges as follows:

I.

That at the different times hereinafter mentioned the American Car and Foundry Company was, and now is, a corporation organized and existing under and by virtue of the laws of the state of New Jersey; that said company during several years last past was, and now is, engaged in the manufacture and sale of gasoline propelled yachts and cruisers; that in the usual course of business after delivery to the purchaser, ownership in said yachts and cruisers so manufactured is retained by said American Car and Foundry Company until the purchaser has made payment of the total amount of the purchase price due.

II.

That on or about the 9th day of June, 1930, H. A. Brassert, the respondent herein, entered his order for one American Car and Foundry Company (hereinafter referred to as A. C. F. Co.) cruiser, model 38′, with standard equipment, f. o. b. Wilmington, Delaware; that the said order was accepted by
4 an officer of said A. C. F. Co., and is in words and figures as follows:

"American Car and Foundry Company
30 Church Street, New York, N. Y.

Order No. 302
Chicago, Ill.
June 9, 1930

Gentlemen:

Please enter my order for 1 A. C. F. Cruiser, Model 38′ with your Standard Equipment (except as otherwise specified herein) to be delivered on or about June 23, 1930 FOB at American Car and Foundry Company's plant, Wilmington, Delaware, at the price and upon the terms herein stated.

Remarks		Price
(Name of cruiser, etc.)	Price of cruiser delivered as above	$13,500.00
	Extra equipment desired: forward cockpit cover	55.00
	Cradle & Loading charge	380.00
	Total price of cruiser	$13,935.00
	Credits:	
	Deposit	$ 3,000.00
	Balance due on delivery of cruiser	$10,935.00

4000 on delivery, balance in 90 days

If full payment for the cruiser is not made within ten days after mailing notification that cruiser is ready for delivery you shall have the right to cancel this order and to retain the deposit and all other payments made as liquidated damages.

The cruiser herein ordered is subject to the warranty appearing on the reverse hereof and no other.

Your obligation with respect to delivery is subject to delays attributable to fires, accidents, labor difficulties, delays of

carriers or in receipt of materials or any other like or unlike causes beyond your reasonable control.

Title to the Cruiser and all equipment herein ordered shall remain in you until same has been fully paid for.

This order is non-transferable and shall not be binding on you until it has been approved by an officer of American Car and Foundry Company.

Purchaser H. A. BRASSERT
Business address 310 So. Mich. Ave
Chicago, Ill.

Salesman WARD A. ROBINSON Residence address 547 Roslyn Road, Kenilworth, Ill.

Accepted:

Approved:
AMERICAN CAR AND FOUNDRY COMPANY
By E. A. HODGE
Manager, Marine Division.

Warranty:—We warrant all goods of our manufacture against defects in workmanship and material. Our obligation under this or any implied warranty is limited to the replacement at our plant of all parts which shall be returned at our plant, transportation prepaid, within the ninety days next following the date of our shipment and which our examination shall disclose to have given out under normal use and service because of any such defect, provided that if the circumstances are such as in our judgment to make impracticable such replacement at our plant, then our sole obligation shall be the shipment, without charge, of parts replacing those so found to be thus defective. We accept no responsibility with respect to any of our products that have been repaired or in any way altered outside of our plant."

III.

That said H. A. Brassert instructed the said A. C. F. cruiser to be shipped by said A. C. F. Co. to said H. A. Brassert at Chicago, Illinois; that said A. C. F. cruiser, as ordered, No. T29, and named "Orion", was shipped and received by said H. A. Brassert at Chicago, Illinois, in good order and condition; that said A. C. F. cruiser was designed and equipped in accordance with the requirements approved by the National Board of Fire Underwriters and, except for

carelessness in operation, was made as safe as prac-
6 ticable from explosion and fire; that said A. C. F. cruiser was equipped with motors and all appurtenances and appliances of modern design and construction and well suited for the uses represented and intended; that said A. C. F. cruiser when delivered to said H. A. Brassert was sturdy, safe and seaworthy.

IV.

That on the 20th day of June, 1930, an agreement was entered into by and between the said parties in words and figures as follows:

"Conditional Sale Agreement

Agreement made this twentieth day of June, 1930, between American Car and Foundry Company, a New Jersey corporation (hereinafter called 'Seller') of the first part, and H. A. Brassert, of, Kenilworth, Illinois, (hereinafter called 'Purchaser') of the second part.

Witnesseth:

1. The Seller agrees to sell and the Purchaser agrees to buy the following described floating equipment (hereinafter called the 'boat'), viz:

One (1) A. C. F. Twin Screw Express Cruiser, having a length of 38 feet, and a beam of 9 feet; numbered T29 and named Orion.

2. The Purchaser acknowledges receipt of said boat, as above described, in good order and condition, and, in consideration of the receipt thereof, agrees to pay Seller as the purchase price thereof the sum of Fourteen Thousand Thirty-nine and 03/100 Dollars ($14,039.03), lawful money of the United States, payable at Seller's place of business, 30 Church Street, Borough of Manhattan, City and State of New York, or at such other place as Seller may designate, in the manner following: Three Thousand and 00/100 Dollars ($3,000.00) accompanying the order (receipt whereof is acknowledged by Seller), Four Thousand and 00/100 Dollars ($4,000.00) on delivery of the boat, and the balance in (1) installment of Seven Thousand Thirty-nine and 03/100 Dollars ($7,039.03) payable Ninety (90) days after delivery of the boat, which installments of purchase price is to be evidenced by negotiable promissory note made by the Purchaser to the order of the Seller, bear-

ing date hereof, and maturing on the due date of the said respective installment.

3. The delivery to and the acceptance of the boat by Purchaser shall not vest in Purchaser any title thereto or right therein other than as defined in this contract, and until payment by Purchaser of the balance of the purchase price and of all the notes provided hereby to be given, and until all the obligations of Purchaser hereunder shall have been fully complied with and performed and until payment or tender by Purchaser to Seller of One Dollar as hereinafter specified, the title to and ownership of the boat shall not pass to or vest in Purchaser but shall remain and be in Seller. Purchaser shall have and be entitled to the possession and use of the boat from its delivery hereunder, but only upon and subject to all the terms and conditions hereof.

4. Purchaser shall at all times, and at Purchaser's own expense, keep the boat insured with full marine coverage including protection and indemnity (with loss, if any, payable to Seller as its interest may appear) in a company or companies approved by Seller. The insurance coverage against loss or damage by fire shall be in an amount not less than the full amount of the notes issued hereunder outstanding and unpaid. The insurance policies, or duplicates of them, shall be delivered to and remain with Seller.

5. Purchaser shall at all times, and at Purchaser's own expense, keep the boat, the equipment thereof and all accessories thereon in good order and condition. Purchaser shall pay, as and when due, all taxes, licenses, assessments and charges of every kind assessed, rated, levied, charged or made against the boat or against Seller as its owner. Purchaser shall comply with all the laws of the United States affecting the boat and of all the States and territories in which the boat may be operated, and with all lawful acts, rules, regulations and directions of any authority exercising any power, regulation or supervision over the boat. Purchaser shall indemnify, protect and hold harmless Seller from and against any and all liability, claim, demand, cost, charge and expense in any way imposed upon or accruing to Seller arising out of or in connection with the use and/or operation of the boat.

6. Purchaser shall not assign or transfer this contract or any of Purchaser's rights hereunder without Seller's written consent first obtained. Purchaser shall not part with the possession or allow the boat to pass out of Purchaser's possession or control, except in the usual and ordinary operation of the

boat. Purchaser shall not cause or permit the boat, or any of its equipment or accessories, to be pledged or held for any taxes, debts or obligations of Purchaser, or to be in any manner encumbered by or through Purchaser. Seller may sell, transfer, pledge or assign all or any of the notes to be issued hereunder, and this contract shall continue and remain as security pro tanto for any note or notes so disposed of. Seller may assign, transfer or pledge this contract and all rights, privileges, powers and remedies hereunder at any time and from time to time as it may deem proper, but in the event of any sale, assignment, transfer or pledge of any of said notes or of this contract, the rights, powers, privileges and remedies herein given and reserved to Seller, in the event of any default by Purchaser, shall remain in Seller to be exercised, if it deems best, as Trustee, of an express trust, but in its own name for the use and benefit of all parties in interest. In the event of the transfer or assignment by Seller of this contract, or of any of said notes, and default thereafter by
8 Purchaser in the payment of any of said notes. Seller may, if it so elects, take up, acquire or pay such notes, or any of them, but in such case the note so taken up, acquired or paid shall not be considered as paid, and the holder thereof shall have as security for the payment thereof the protection and benefit pro tanto of this contract. Any extension or assignment of said notes, or any of them, or of this contract, shall not vest title to said boat in Purchaser or constitute a waiver of any of the conditions of this Agreement.

7. Upon payment in full by Purchaser of the purchase price and of all the notes issued hereunder, and upon performance by Purchaser of all of Purchaser's obligations under this contract, and upon the payment by Purchaser to Seller of the further sum of One Dollar, Seller will, at Purchaser's expense, execute and deliver to Purchaser a bill of sale or such other instrument of transfer as may be reasonably required by Purchaser as evidence of Purchaser's title to the boat and of Purchaser's compliance with the terms of this contract and as evidence that the absolute ownership of the boat is vested in Purchaser.

8. Purchaser shall be entitled to the possession and use of the boat so long as Purchaser shall observe the conditions and obligations thereof, but (1) if Purchaser shall default in the payment, at maturity, of any of the notes issued hereunder whether or not demand be made for the payment thereof; or (2) if Purchaser's property, or any part thereof, shall pass

into the possession of a receiver or receivers or a petition in bankruptcy be filed by, or against, the Purchaser, or if the Purchaser shall make a general assignment for the benefit of creditors; or (3) if Purchaser shall default in the due observance or performance of any other of the terms, provisions, conditions, covenants or obligations of this contract; or (4) if the Seller shall deem the security for the payment of said notes intended to be afforded hereby insufficient or unsafe, then and in such case, or either of such cases, Seller shall be entitled to and may at its option retake the boat, the equipment thereof and the accessories thereto, retaining all payments which up to that time shall have been made on account thereof (which amount, it is hereby expressly agreed, constitutes no more than the reasonable value of the use of the boat). For the purpose of taking such possession, Seller shall be entitled to enter upon and take and remove the boat from the premises of Purchaser, or wherever it may be found. Upon retaking or sale as herein provided for of the boat by Seller, Purchaser will relinquish all claims or rights in or to the same. Upon the occurring of any of the contingencies specified in (1), (2), (3) and (4) of this clause of this contract, all of the notes then outstanding and all other sums payable hereunder may by the holder of said notes be declared immediately due and payable, and a retaking of the boat by Seller shall not be a bar to or otherwise affect the right to recover thereon. Upon any such declaration of immediate maturity, Seller may sell the boat with or without notice to Purchaser, either at public or private sale, on such terms as it shall deem advisable. The proceeds of any such sale, after the pay-
9 ment of the necessary expenses in connection therewith and in connection with the retaking and holding of the boat, shall be applied to the payment of the outstanding notes issued hereunder. No sale or taking possession of the boat by Seller shall in any way prejudice any other right or cause of action it may have hereunder. The remedies herein created in favor of Seller shall not be deemed exclusive but shall be cumulative and in addition to all other remedies existing at law or in equity in its favor. If upon any such sale the proceeds thereof are insufficient to pay the sums remaining unpaid with respect to said notes and the expenses caused by such re-possession, removal, storage and sale, any deficiency shall be paid by the Purchaser. In the event of any such sale, Seller may become the Purchaser.

9. If the Purchaser shall fail or omit to make any payment

or to do anything which under the provisions of this contract Purchaser should make or do, then Seller itself may make such payment or do, or cause to be done, such thing, but shall not be obliged to do so. Any such payment made by Seller and the cost and expense to it for and in and about doing or causing to be done any such thing, will be a charge against Purchaser, which Purchaser agrees hereby to repay to Seller on demand with interest at the rate of six per cent per annum. The making by Seller of any such payment or the doing by it of any such thing shall not in any way prejudice or be a waiver of any right reserved or remedy available to it under this contract or otherwise because of such failure or omission by Purchaser.

Made and entered into the day and year first above written.

AMERICAN CAR AND FOUNDRY COMPANY,
By G. R. SCANLAND.

Attest:
H. C. WICK
Secretary.

(Corporate Seal) H. A. BRASSERT (L. S.)

State of Illinois }
County of ..... } ss.

I, Marion Flatley, a notary, do hereby certify that H. A. Brassert, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal this 18th day of 10 June, 1930.

My Commission Expires April 7, 1931.

MARION FLATLEY.

(Notarial Seal)"

V.

That subsequent to the 20th day of June, 1930, and prior to the 18th day of August, 1930, said H. A. Brassert paid to said American Car and Foundry Company the sum of Seven Thousand Dollars ($7,000.00) as promised in said agreement, as aforesaid; that on the 18th day of August, 1930, said agreement was in full force and effect and that there was due and

owing said American Car and Foundry Company, as owner, from said H. A. Brassert the sum of Seven Thousand Thirty-nine Dollars and Three Cents ($7,039.03) as set forth in said agreement and as evidenced by a promissory note for said amount, dated June 20, 1930, signed by said H. A. Brassert as maker and payable to said A. C. F. Co. 90 days after date.

VI.

That on the 18th day of August, 1930, libellant is informed that said A. C. F. cruiser was being operated by said H. A. Brassert on the waters of Lake Michigan, one of the navigable waters of the United States, at a point about three miles from the shore of the United States Army Reservation known as Fort Sheridan, in the State of Illinois; that at the time and place stated said H. A. Brassert was cruising on the waters of Lake Michigan from the harbor at Milwaukee, Wisconsin, to the harbor at Wilmette, Illinois, and from causes unknown to said American Car and Foundry Company an explosion is alleged to have occurred midship and near the motors of said cruiser; that your libellant is informed that said explosion was followed by fire.

VII.

That said A. C. F. cruiser burned to the water's edge,
11 filled with water, was sunk and became a total wreck and loss. Said H. A. Brassert claims that he was burned by the flames and as a result thereof received injuries alleged to be serious and permanent. Said H. A. Brassert and two other persons with him (whose names and whose injuries, if any, are unknown to the libellant) in said A. C. F. cruiser at the time and place stated are alleged to have jumped into the waters of Lake Michigan with life belts and were rescued by a sea-plane from Great Lakes Naval Training Station, on the coast of Lake Michigan, Great Lakes, Illinois.

That at the time and place of the alleged explosion in question, said H. A. Brassert claims to have been in possession of on said A. C. F. cruiser certain fishing rods, tackle, guns, golf bags and clubs and other personal effects and supplies alleged to be of the value of Two Thousand Seven Hundred Dollars ($2,700.00). That all of said personal effects and supplies said H. A. Brassert claims were a total wreck and loss; that

no amount of the personal effects and supplies of the respondent on board at the time of the accident were salvaged; that said cruiser and its machinery, equipment, personal effects and supplies were a total loss and no part thereof was salvaged.

VIII.

All of the said alleged injuries and damage to the persons on board, and the loss of and damage to the property, as stated, were occasioned and incurred without the privity or knowledge of the libellant, the owner of said cruiser.

IX.

The libellant further alleges that, as it is informed and believes, certain persons or corporations, insurer of said cruiser and of property on board, and lost or damaged by and at the time of the loss of said cruiser as aforesaid; certain other persons who claim to have been on board said
12 cruiser at the time of the loss aforesaid, and to have suffered in consequence thereof injuries and damage to their persons and property; and still other persons, claiming to be entitled to recover and receive large sums of money on account of injuries to said persons so represented by them—all make, or may hereafter make, claim that the explosion and fire, and sinking and wreck of said cruiser, and also claim that the injury and damage to persons and property as aforesaid, were occasioned and incurred from the fault and neglect of the libellant, or its officers and agents, and that the libellant is liable and responsible to pay to them the loss and damages arising as aforesaid; all of which claims and allegations the libellant denies, and on the contrary it alleges that all such losses and damages as alleged were occasioned or incurred without its neglect, fault, privity or knowledge, and without the neglect or fault, privity or knowledge of its officers or agents, or any or all of them.

X.

The alleged losses and damage to persons and property incurred and occasioned by the said explosion, fire, sinking and loss of said cruiser and the alleged claims and liabilities made against the libellant by reason thereof greatly ex-

ceed the amount or value of the interest of the libellant as owner in said cruiser, her machinery, tackle, furniture and supplies, immediately after said loss. Upon and after the happening of said loss, said cruiser, her machinery, tackle, furniture and supplies became a wreck and total loss and the libellant is informed and believes were then practically worthless, and the libellant's interest therein became and was of little or no value.

XI.

The libellant while not admitting but denying that it is under any liability for the acts, losses and damages
13 aforesaid, and desiring and claiming the right in this court to contest any such liability of itself or of the said cruiser, claims and hereby alleges that it is entitled to have limited its liability as owner therefor (if any such liability shall hereafter be found to exist) to the amount or value of its interest as owner in said cruiser after said loss.

XII.

Said cruiser in her damaged and wrecked condition now lies sunken approximately three miles from the shore at Fort Sheridan, State of Illinois, within this district and within the jurisdiction and process of this Honorable Court.

XIII.

The libellant claims and petitions that in case it should be found that there is any liability for the acts, losses and damages aforesaid, upon said cruiser "Orion", or upon the libellant, as owner thereof, (which liability the libellant does not admit, but expressly and wholly denies and desires in this court to contest) such liability shall in no event exceed the amount or value of the interest of the libellant as owner in said cruiser immediately after said loss, and as provided by the third and fourth sections of the Act of March 3, 1851 entitled "An Act to limit the liability of ship owners and for other purposes", now embodied in Sections 4283 to 4285 of Revised Statutes, as now or hereafter amended or supplemented, said Section 4283 of Revised Statutes providing as follows:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and
14 her freight then pending."

XIV.

The libellant, therefore, prays that all claims for loss, damage or injury to persons or property by reason of the premises be heard and determined in this court; that the amount or value of the interest of your libellant, as owner of such vessel, immediately after said loss be apportioned according to law; that due appraisement be ordered and made of the said cruiser, her machinery, supplies and furniture at the time of the loss. Your libellant offers to pay the appraised value into court, or to give a stipulation with good and sufficient sureties or an approved corporate surety, whenever the same shall be ordered, and to do all acts and things as required by the rules of this court or in the exercise of its legal discretion.

XV.

Your libellant also prays that a monition in due form be issued against the said H. A. Brassert and any and all persons or corporations claiming damages for any injury, loss, destruction or damage, citing them to appear before the said court and file their respective claims at or before a certain time to be named in said writ, not less than thirty days from the issuing of the same; that public notice of such monitions be ordered as in other cases, and such further notice served through the post office, or otherwise as the court in its discretion may direct; that the court shall also on application of your libellant as owner of said cruiser, make an order to restrain the further prosecution of all and any suit or suits and of all and any action or actions against said libellant, now pending or hereafter filed in respect to any such claim or claims.

15 XVI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libellant prays that process in due form may issue against the said H. A. Brassert; that this Honorable Court will be pleased to pronounce in favor of libellant's petition; that this libellant may have such other and further relief as in law and justice it may be entitled to receive.

AMERICAN CAR AND FOUNDRY COMPANY
By H. C. WICK
Secretary

HARDY, STANCLIFFE & HARDY
KNAPP, BEYE, ALLEN, COCHRAN & CUSHING
Proctors for Libellant.

State of New York, } ss.
County of New York, }

H. C. WICK, being first duly sworn, deposes and says that he is the duly elected and acting secretary of American Car and Foundry Company, that he has read the foregoing libel and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

H. C. WICK

Subscribed and sworn to before me this 4th day of April, 1931.

H. NORMAN SPY
(Notarial Seal) *Notary Public, Queens County.*

(Stamped) Queens Co. Clk's No. 3360 Register's No. 3948
New York Co. Clk's No. 1836 Register's No. 281204
King's Co. Clk's No. 441 Register's No. 2706
Term expires March 30th, 1932

16 And on, to wit, the 6th day of July, 1931 came the Libellant by its attorneys and filed in the Clerk's office of said Court a certain Libellant's Stipulation in words and figures following, to wit:

17 LIBELLANT'S STIPULATION. Filed July 1931.

United States of America,
Northern District of Illinois, } ss.
Northern Division.

UNITED STATES DISTRICT COURT,

Sept. Term, A. D. 1931.

Whereas, a libel was filed in this Court on the 6th day of July, A. D. 1931, by American Car and Foundry Company, a corp., against H. A. Brassert, for the reasons and causes in said libel mentioned; and praying that the same may be condemned, and sold to answer the prayer of the libelant; and the said libelant and Paul R. Conaghan, surety, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libelant, or surety, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars.

Now, Therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and are, bound in the sum of two hundred and fifty dollars, conditioned that the libelants above named shall pay all such costs as shall be awarded against it by this Court, or, in case of appeal, by the Appellate Court.

AMERICAN CAR AND FOUNDRY CO.
a corp

PAUL R. CONAGHAN

Taken and acknowledged this 6th day of July, A. D. 1931, before me.

.....
U. S. Commissioner.
JOSEPH A. MUIR
Deputy Clerk

(Seal)

Northern District of Illinois:—ss.

PAUL R. CONAGHAN, party to the above stipulation, being duly sworn, deposes and says that he resides in the Northern District of Illinois, and is worth the sum of five hundred dollars over and above all his debts and liabilities.

PAUL R. CONAGHAN

Sworn this 6th day of July, A. D. 1931, before me.

JOSEPH A. MUIR
Deputy Clerk

(Seal)

Sept. 8, 1931

18 And on, to wit, the 8th day of September 1931 came the Respondent by his attorneys and filed in the Clerk's office of said Court a certain Exceptions to Libel in words and figures following, to wit:

19 * * (Caption) * *

EXCEPTIONS TO LIBEL.

To the Honorable Judges of the District Court of the United States for Said District:

The Respondent, H. A. Brassert, hereby excepts to the libel herein in the following respects:

1. That it does not disclose that the Libelant was the owner of the motor boat "Orion" at the time of its destruction by explosion and fire, as therein alleged.

2. That it does not disclose that the Libelant was the owner of said motor boat "Orion" in such manner and to such extent as to warrant the maintenance of a proceeding to limit the liability of ship-owners.

3. That it does not disclose that at the time of its destruction by explosion and fire, as therein alleged, or at any
20 time prior thereto, said motor boat "Orion" was engaged or was being used by Libelant in maritime commerce upon the high seas and/or upon the navigable waters of the United States.

4. That it does not disclose that at the time of its destruction by explosion and fire, as therein alleged, or at any time prior thereto, the said motor boat "Orion" was engaged or was being used by Libelant in the transportation of passengers and/or freight for hire upon the high seas and/or upon the navigable waters of the United States.

5. That it does not disclose that at the time of the destruction of the motor boat "Orion" by explosion and fire, as therein alleged, Libelant was a "ship-owner" within the meaning of that term as used in Sections 183 to 189, inclusive, U. S. C. A., Chapter 8, Title 46, or any other acts or statutes of the United States limiting the liability of "ship-owners."

6. That it does not disclose that at the time of the destruction of said motor boat "Orion" by explosion and fire, as therein alleged, or at any other time, Libelant was engaged

in the business of building and operating ships or boats of any kind in marititme commerce upon the high seas and/or upon the navigable waters of the United States.

7. That it does not disclose that at the time of the destruction of said motor boat "Orion" by explosion and fire, as therein alleged, or at any other time, Libelant was engaged in the business of shipping upon the high seas and/or upon the navigable waters of the United States.

8. That it does not disclose that there was no freight or passenger money pending at the time of the destruction of said motor boat "Orion" by explosion and fire, as therein alleged, to be surrendered and applied as provided by law.

21 9. That it does not disclose that Libelant exercised due care and diligence in selecting a competent master and crew for said motor boat "Orion".

10. That it does not disclose that the motor boat "Orion" was properly officered and equipped at and before its destruction by explosion and fire, as therein alleged.

11. That it does not disclose that the person before whom it was verified was authorized to administer oaths in the State of New York where said verification was taken.

12. That it does not disclose that the contract set forth in Paragraph 4 thereof is not personal, creating a personal liability on Libelant and therefore is not within the statutes of the United States limiting the liability of ship-owners.

13. That it does not disclose facts sufficient to justify limiting the liability of Libelant.

14. That it does not disclose that a Court of Admiralty has jurisdiction of the subject-matter of this proceeding.

In all which particulars the said libel is imperfect, insufficient and indistinct and therefore the said Respondent is not bound to answer the same and he prays that the said libel may be dismissed with costs.

Dated at Chicago, September 8, 1931.

WEST & ECKHART
Proctors for Respondent.

22 And afterwards, to wit, on the 16th day of November 1931, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter District Judge, appears the following entry, to wit:

ed Nov. 1931.

23 * * (Caption) * *

Monday, November 16, 1931.

Present: Honorable George A. Carpenter, Judge of said Court.

This cause coming on to be heard upon the exceptions of the respondent to the libel filed in said cause and after arguments of counsel and due deliberation by the court said exceptions are sustained to which ruling of the court the libellant by its proctors here and now duly except and ten (10) days time from this date is allowed the libellant within which to amend its libel or stand on the same.

ed Nov. 1931.

24 And afterwards, to wit, on the 30th day of November, 1931, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry, to wit:

25 * * (Caption) * *

DECREE.

This matter coming on to be heard on motion of Respondent by his proctors that the libel be dismissed, and it appearing that Libellant has not amended its libel, and Libellant being present by its proctors who state to the court that Libellant has elected to stand on its libel;

It Is Hereby Ordered and Decreed that the libel be and the same is hereby dismissed.

To which order and decree the Libellant by its proctors objects and excepts.

Enter this 30th day of November, 1931.

CARPENTER
Judge.

26 And on, to wit, the 30th day of November, 1931 came the Libellant by its attorneys and filed in the Clerk's office of said Court a certain Petition for Appeal in words and figures following, to wit:

27 * * (Caption) * * Filed Nov. 1931.

PETITION FOR APPEAL.

To the Honorable George A. Carpenter, Judge of said District Court:

Now comes American Car and Foundry Company, a corporation, Libellant in the above cause, and feeling aggrieved by the decree of this court entered herein on the 30th day of November, 1931, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the Assignment of Errors filed herewith, and prays that its appeal be allowed and that citation be issued directed to H. A. Brassert, Respondent in said cause, commanding him to appear before said United States Circuit Court of Appeals to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record upon which said decree was made, duly authenticated, be sent to said Circuit Court of Appeals, and prays that the proper order relating to the security to be required of Libellant on said appeal be made.

AMERICAN CAR AND FOUNDRY COMPANY,
By HARDY, STANCLIFFE & HARDY
KNAPP, BEYE, ALLEN, COCHRAN & CUSHING
Its Proctors.

28 And on, to wit, the 30th day of November, 1931 came the Libellant by its attorneys and filed in the Clerk's office of said Court a certain Assignment of Errors in words and figures following, to wit:

29 * * (Caption) * *

ASSIGNMENT OF ERRORS.

Now comes the Libellant, American Car and Foundry Company, a corporation, and in connection with its petition for an appeal in the above cause, says that in the record, proceedings and decree entered in said cause there is manifest error to the prejudice of Libellant, as follows:

1. The court erred in sustaining the exceptions of the Respondent to the libel.

2. The court erred in entering a decree that the libel be dismissed.

Wherefore, Libellant prays that the decree entered in said cause be reversed.

AMERICAN CAR AND FOUNDRY COMPANY,
By HARDY, STANCLIFFE & HARDY
KNAPP, BEYE, ALLEN, COCHRAN & CUSHING
Its Proctors.

d. Nov. 1931.

30 And afterwards, to wit, on the 30th day of November, 1931, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry, to wit:

31 * * (Caption) * *

ORDER.

This cause coming on to be heard on the petition of American Car and Foundry Company, a corporation, Libellant, for an order allowing it to appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and an Assignment of Errors accompanying said petition, and it appearing that notice of said petition has been given to Respondent, and Respondent being present in court by his proctors,

It Is Ordered in Open Court that an appeal be and the same is hereby granted and allowed to the Libellant, American Car and Foundry Company, a corporation, from the decree of this court entered herein on the 30th day of November, 1931, to the said United States Circuit Court of Appeals for the Seventh Circuit, and that citation issue directed to H. A. Brassert, Respondent, commanding him to be and appear before the said United States Circuit Court of Appeals to answer the said appeal.

And said Respondent by his proctors now stating to the court that Respondent waives the requiring of any appeal bond of Libellant, It Is Ordered that bond for $200. is required on said appeal.

Enter this 30th day of November, 1931.

CARPENTER
Judge.

32 And on, to wit, the 5th day of December 1931 come American Car and Foundry Company a corporation as principal and United States Fidelity and Guaranty Company, a corporation as surety, and filed in the Clerk's office of said Court, in said entitled cause, a certain Bond on Appeal in words and figures following, to wit: Filed Dec. 1931.

33 Know all Men by these Presents:

That we, American Car and Foundry Company, a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto H. A. Brassert in the full and just sum of Two Hundred Dollars ($200.00) to be paid to the said H. A. Brassert, his attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 5th day of December in the year of our Lord one thousand nine hundred and Thirty-one.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division in a suit pending in said Court, between American Car and Foundry Company, a corporation, Libellant, and H. A. Brassert, Respondent a decree was rendered against the said American Car and Foundry Company, a corporation, Libellant, and the said American Car and Foundry Company, a corporation, having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree of the aforesaid suit, and a citation directed to the said H. A. Brassert citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from November 30, 1931.

Now, the condition of the above obligation is such, that if the said American Car and Foundry Company, a corporation, shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails

to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

AMERICAN CAR AND FOUNDRY COMPANY
By G. R. SCANLAND (Seal)
V. P.

Attest:
H. C. WICK,
Secretary.

Sealed and delivered in presence of:

.....

.....

UNITED STATES FIDELITY AND GUARANTY Co. a corporation
By H. W. SHIELDS
Attorney in fact.

12/2/31

O. K. WEST & ECKERT

Approved by:
CARPENTER.

5 Dec. 1931

(Endorsed) No. 39707 United States District Court Northern District of Illinois Eastern Division American Car and Foundry Company, a corporation, Libellant vs. H. A. Brassert, Respondent Bond on Appeal.

34 * * (Caption) * *

PRAECIPE FOR RECORD.

To the Clerk of said District Court:

You will please make up the record, in accordance with the Admiralty Rules of the Supreme Court, to be transmitted to the United States Circuit Court of Appeals for the Seventh Circuit on the appeal heretofore allowed by said District Court in the above cause, and include therein the following:

Libel.
Libellant's Stipulation.
Exceptions of Respondent to libel.
Order of November 16, 1931, sustaining exceptions to libel.
Decree of November 30, 1931, dismissing libel.
Petition for appeal filed by Libellant.
Assignment of errors filed by Libellant.

Order of November 30, 1931, allowing appeal.
Citation.
Appeal bond.
Praecipe for record, filed by Libellant.

HARDY, STANCLIFFE & HARDY,
KNAPP, BEYE, ALLEN, COCHRAN & CUSHING,
Proctors for American Car and Foundry Company, Libellant, (Appellant).

Receipt of a copy of the foregoing praecipe is hereby acknowledged, this 30 day of November, 1931.

WEST & ECKHART,
Proctors for H. A. Brassert, Respondent.

Endorsed: Filed Dec. 2, 1931. Charles M. Bates, Clerk.

35 Northern District of Illinois } ss:
Eastern Division }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled American Car and Foundry Company, a corporation vs. H. A. Brassert No. 39707 as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 8th day of December, A. D. 1931.

CHARLES M. BATES,
Clerk.

(Seal)

36 United States of America, } ss.

The President of the United States, To H. A. Brassert, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to the order allowing an appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, in Cause No. 39707 in Admiralty in said District Court, wherein American Car and Foundry Company, a corporation, is Libellant and you are Respondent to show cause, if any there be, why the decree rendered against the said Libellant as in the said order allowing the appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George A. Carpenter, Judge of the District Court of the United States, this 30th day of November, in the year of our Lord one thousand nine hundred and Thirty-one.

GEORGE A. CARPENTER
Judge.

Service of the above citation is hereby acknowledged, this 30th day of November, 1931.

WEST & ECKHART
Proctors for H. A. Brassert, Respondent.

(Endorsed) * * (Caption) * * Citation Filed Nov 30 1931 Charles M. Bates, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing Printed pages, numbered from 1 to 24, inclusive, contain a true copy of the Printed Record, printed under my supervision and filed on the sixteenth day of January, 1932, on which the following entitled cause was heard and determined:

American Car and Foundry Company, a corporation,
Appellant,

vs.

H. A. Brassert,
Appellee,

No. 4710, October Term, 1931, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of November, A. D. 1932.

FREDERICK G. CAMPBELL,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in the Seventh Circuit on the sixth day of October, 1931, of the October Term in the year of our Lord one thousand nine hundred and thirty-one, and of our Independence the one hundred and fifty-sixth.

American Car and Foundry Company, a corporation,
4710 *vs.*
H. A. Brassert

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And on the twenty-first day of December, 1931, there was filed in the office of the Clerk of this Court an Appearance of Counsel for Appellant, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, 1931.

American Car and Foundry Company,
Appellant,

vs.

H. A. Brassert,
Appellee.

The Clerk will enter my appearance as Counsel for the Appellant.

CHARLES J. HARDY,
NOAH A. STANCLIFFE,
30 Church Street,
New York City.
JOHN R. COCHRAN,
LEONARD F. MARTIN,
PAUL R. CONAGHAN,
208 So. La Salle Street,
Chicago, Illinois.

Endorsed: Filed December 21, 1931. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-third day of December, 1931, there was filed in the office of the Clerk of this Court an Appearance of Counsel for Appellee, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, 1931.

American Car and Foundry Company,
Appellant,

vs.

H. A. Brassert,
Appellee.

The Clerk will enter my appearance as Counsel for Appellee.

PERCY B. ECKHART,
ROY O. WEST,
38 So. Dearborn St.,
Chicago, Ill.

Endorsed: Filed December 23, 1931. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twelfth day of April, 1932, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 12, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

American Car and Foundry Company		Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
4710	*vs.*	
H. A. Brassert		

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on May 18, 1932.

And afterwards, to-wit: On the eighteenth day of May, 1932, there was filed in the office of the Clerk of this Court an Appearance of Counsel for Appellee, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, 1931.

American Car and Foundry Company,
Appellant,

vs.

H. A. Brassert,
Appellee.

The Clerk will enter my appearance as Counsel for Appellee.

LEWIS C. JESSEPH,
38 So. Dearborn St.,
Chicago, Ill.

Endorsed: Filed May 18, 1932. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the eighteenth day of May, 1932, the following further proceedings were had and entered of record, to-wit:

Wednesday, May 18, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

American Car and Foundry Company
4710 *vs.*
H. A. Brassert

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Leonard F. Martin and Mr. Paul R. Conaghan, counsel for Appellant, and by Mr. Lewis C. Jesseph, counsel for Appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twenty-fourth day of June, 1932, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, 1931, April Session, 1932.

American Car and Foundry Company, a Corporation, *Appellant*,
vs.
H. A. Brassert, *Appellee*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

June 24, 1932.

Before ALSCHULER, EVANS, and SPARKS, *Circuit Judges*.

This action, which is a proceeding by a libel in admiralty, was brought by appellant to limit its liability for damage, if any, as owner of a cruiser or motor boat, which damage is claimed to have resulted to appellee's person and personal property by reason of an explosion occurring on said boat while it was being operated by appellee on Lake Michigan. The relief sought is based upon Section 3 of An Act to Limit the Liability of Ship-Owners, and for Other Purposes, which was enacted March 3, 1851, 9 Stat. 635, c. 43, R. S. Sec. 4283, 46 U. S. C., Sec. 183.*

Appellant is engaged in the manufacture and sale of gasoline-propelled yachts and cruisers, and on June 20, 1930, it and appellee entered into a written conditional agreement for the sale by appellant to appellee of the boat now in controversy. By the terms of the agreement the bare legal

* 46 U. S. C., Sec. 183:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

title to the boat was retained by appellant until the purchase price of $14,039.03 was paid. Of that amount appellee paid $3,000 when he signed the agreement, and upon delivery of the boat he paid an additional sum of $4,000. For the balance appellee executed his negotiable promissory note due and payable ninety days after delivery of the boat. On August 18, 1930, within the ninety day period, the boat was destroyed by the explosion and fire.

The written agreement further provides that the purchaser shall have and be entitled to the possession and use of the boat so long as he observes the conditions and obligations of the agreement; and that he shall indemnify, protect, and hold harmless the seller from and against any and all liability, claim, demand, charge, cost and expense in any way imposed upon or accruing to the seller arising out of or in connection with the use and occupation of the boat.

At the time of the accident the boat was in appellee's possession and use, and neither the appellant nor any person or persons acting for or in its behalf were in charge of the boat. It does not appear of record that appellant, at the time of the accident, was operating the boat in the transportation of passengers or freight upon any of the navigable waters of the United States; or that it was using the boat for any maritime purpose; or that it was engaged in any maritime business or occupation, at or before the accident.

Thereafter, and before the filing of this action, appellee brought an action against appellant on the common law side of the United States District Court at Chicago to recover damages for personal injuries and loss of personal property sustained through the carelessness and negligence of appellant in constructing, equipping, and inspecting the boat. That action is now pending and undetermined.

In the District Court exceptions were filed to the libel and were sustained. Upon failure to plead over a judgment of dismissal was entered, which constitutes the basis for this appeal.

SPARKS, *Circuit Judge*. The question presented by this appeal is whether the libel states sufficient facts to entitle appellant to limit its liability, if there be any liability.

In support of the trial court's ruling that the facts pleaded are not sufficient for that purpose, appellee relies upon three propositions: (1) At the time the boat was destroyed appellant was not the owner thereof within the meaning of the word "owner" as used in the statutes upon which appellant

relies. (2) The statutes limiting the liability of owners of vessels do not apply to one engaged solely in the manufacture of gasoline-propelled yachts and cruisers or other vessels. (3) Since the boat was not manned and operated by a master and crew of appellant, there is no liability that can be limited by a court of admiralty.

If appellee's position is correct as to any one or more of the propositions above set forth, the ruling of the trial court must be affirmed.

In determining whether appellant was the owner of the boat at the time of the accident it is quite necessary to refer to the conditions as they existed at the time of the enactment, as well as to subsequent decisions, in order to gather, if possible, the reasons which prompted the legislation and guided the courts' interpretation of it.

In *The Main* v. *Williams*, 152 U. S. 122, the court, in referring to limited liability of ship owners, said:

> "The earliest American legislation upon this subject is found in a statute of Massachusetts passed in 1818, and revised in 1836. This was taken substantially from the statute of George II. It was followed by an act of the legislature of Maine in 1831, copied from the statute of Massachusetts.
>
> "The attention of Congress does not seem to have been called to the necessity for similar legislation until 1848, when the case of *The Lexington*, reported under the name of the *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 6 How. 344, was decided by this court. In this case the owners of a steamboat which was burnt on Long Island Sound, were held liable for about $18,000 in coin, which had been shipped upon the steamer and lost. In consequence of the uneasiness produced among ship owners by this decision, and for the purpose of putting American shipping upon an equality with that of other maritime nations, Congress, in 1851, enacted what is commonly known as the Limited Liability Act * * *.
>
> " 'This statute, whenever applied, must derogate from the direct right of the ship owner against the other ship owner. * * * It should be so construed as to derogate as little as is possible consistently with its phraseology, from the otherwise legal rights of the parties.' * * being in derogation of the common law, we think the court should not limit the right of the injured party to a recovery beyond what is necessary to effectuate the purposes of Congress."

In *Evansville and Bowling Green Packet Co.* v. *Chero Cola Bottling Company*, 271 U. S. 19, the court said:

> "The rule of limited liability of owners of vessels is an ancient one. It has been administered in the courts of admiralty in Europe from time immemorial and by statute applied in England for nearly two centuries. * * Our statutes establishing the rule were enacted to promote the building of ships, to encourage the business of navigation, and in that respect to put this country on the same footing with other countries. * * The rule should be applied having regard to the purposes it is intended to subserve and the reasons on which it rests."

In *The "Scotland,"* 105 U. S. 24, the court, referring to the same statute, said:

> "This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employes, but risk only the amount of their capital stock in the corporation. * * Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise."

Obviously, therefore, the purpose of the statute is to promote shipping or martime commerce by limiting the liability, under certain conditions, of the owners of vessels who engage in it. The conditions are (1) that there must be an act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred for which the owner of the vessel is liable to respond; (2) the act or thing which resulted in such damage must have occurred without the privity or knowledge of the owner. Under the statute, if the accident which caused the damage was with the privity or knowledge of the owner of the vessel, he is not entitled to limitation of his liability. In other words, the statute does not protect him against liability for his direct acts or omissions, but only against acts and omissions of others which occurred without his privity or knowledge, and for which he is liable. The liability which the statute limits is an imputed one, and the imputation is raised because of his ownership and the relationship which exists between himself and those in charge of the vessel.

In the instant case it is not claimed by either party that at the time of the accident there was existing between the parties any relationship of agency or master and servant, or any similar relationship. Appellant had nothing whatever to do, either directly or indirectly, with the management, operation, or control of the boat. The relationship between the parties was merely that of buyer and seller. Part of the purchase price was unpaid and was not due, and appellee had not violated the contract of sale in any particular. Appellant merely retained the bare legal title of the boat as security for the unpaid portion of the purchase price. Indeed, the sixth paragraph of the sales agreement characterizes the contract as a *security* for the unpaid note, and we think it must be so considered. *Morgan's Assignees* v. *Shinn*, 82 U. S. 105.

It is stated in *Hyde* v. *Shine*, 199 U. S. 62, that the word "owner" has a variety of meanings—that it may include equitable as well as legal ownership, and implies something more than a bare legal title. The word "owner" is *nomen generalissimum* and its meaning is to be gathered from the connection in which it is used. *Warren* v. *Lower Salt Creek Drainage District*, 316 Ill. 345.

The vendors of a vessel under a conditional sales agreement are not liable as owners for loss of freight or for repairs or supplies furnished to the vessel. *Jones* v. *Pitcher*, 3 S. & P. (Ala.) 135, 24 Am. Dec. 716; *Thorn* v. *Hicks*, 7 Cowen (N. Y.) 696; *Leonard* v. *Huntington*, 15 Johns. (N. Y.) 298; *Wendover and Hinton* v. *Hogeboom*, 7 Johns. (N. Y.) 307. In *Morgan's Assignees* v. *Shinn*, *supra*, it was held that a mortgage of a vessel out of possession is not liable for repairs as an owner.

We are convinced that under the circumstances of this case appellant cannot be considered as the owner of the vessel in controversy within the meaning of the statute.

Our attention is called to *Flink* v. *Paladini*, 279 U. S. 59, as supporting appellant's position. In that case petitioner, who was injured upon a tug boat owned by the corporation, sued the corporation and its stockholders for damages arising out of said injury. He sought to hold the stockholders under the laws of California, which provide for personal and individual liability of the stockholders for the debts and liabilities of the corporation while they are stockholders. The corporation owned the boat and was protected by the statute. The stockholders also pleaded ownership and asked that their liability be limited. The court held that in common speech

they would be called owners in order not to defeat the manifest intent of the statute, and to that end said, "no rational distinction can be taken between several persons owning shares in a vessel directly and making the same division by putting the title in a corporation and distributing the corporate stock." We do not regard that holding to be in any way inconsistent with our ruling.

Appellant also relies on *The Milwaukee*, 48 F. (2d) 842, but in that case the agreement to sell was executory, and the performance was awaiting the doing of a future act.

A perusal of the other cases relied upon by appellant convinces us that they are readily distinguishable from the instant case as to factual content, and that they are not inconsistent with this opinion.

It has been repeatedly held that the manufacture of boats is not a maritime enterprise. *Edwards* v. *Elliott*, 88 U. S. 532; *The Winnebago*, 205 U. S. 354; *North Pacific Steamship Co.* v. *Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U. S. 119; *Thames Towboat Co.* v. *The Schooner "Francis McDonald,"* 254 U. S. 242.

It must be borne in mind that appellee's cause of action is not based on appellant's ownership. Appellant is not sued as an owner but as a manufacturer or builder, and the gist of the action is appellant's direct negligence in construction, equipment, and inspection, a failure of a duty which, so far as liability is concerned, is in no way connected with maritime enterprises or with appellant's ownership. Under such circumstances, to permit appellant to limit its liability on the ground that it holds a bare legal title by reason of a conditional sale, which appellant must be considered as admitting is a mere security for the unpaid purchase price, we think is going further than the statute warrants.

We are further of the opinion that the statute purports to limit only that liability which arises from or grows out of ownership. In the instant case there is no such liability claimed, and until such liability is apparent there can be no limitation.

Decree

AFFIRMED.

Endorsed: Filed June 24, 1932, Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fourth day of June, 1932, the following further proceedings were had and entered of record, to-wit:

Friday, June 24, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evans A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

American Car and Foundry Company, a Corporation,
4710 *vs.*
H. A. Brassert

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed with costs.

And afterwards, to-wit: On the fourteenth day of July, 1932, there was filed in the office of the Clerk of the Court, a petition for a rehearing, which said petition for a rehearing is in the words and figures following, to wit:

No. 4710

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1931.

AMERICAN CAR AND FOUNDRY COMPANY, a corporation,
(Libellant) Appellant,

vs.

H. A. BRASSERT,
(Respondent) Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable
Geo. A. Carpenter,
District Judge.

Petition for Rehearing.

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FILED

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1931.

No. 4710.

AMERICAN CAR AND FOUNDRY COMPANY, a corporation, (Libellant) Appellant, vs. **H. A. BRASSERT,** (Respondent) Appellee.	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable **Geo. A. Carpenter,** District Judge.

Petition for Rehearing.

A rehearing in this case should be allowed. Appellant respectfully petitions this court for a rehearing because it submits that the following points have been overlooked and misapprehended by the court:

I.

We respectfully submit that the court has erred in holding that appellant was not the "owner" of the boat.

This error, we submit, is due to the fact that the court has overlooked the well established legal proposition that where a conditional sale contract is entered into, the vendee acquires no ownership in the goods and that the delivery of possession takes effect only according to the agreement of the parties and can operate to vest the title in the vendee only when the contingency contemplated by the contract arises.

This fundamental proposition is settled beyond all question by the decisions of the United States Supreme Court. In our principal brief (Appellant's Brief pp. 19-20) we cited, among other cases, *Bierce* v. *Hutchins*, 205 U. S. 340, which squarely holds the proposition asserted. As pointed out in that case, the fact that possession was to be and was delivered to the vendee did not make the property belong to the vendee, nor even did the requirement of additional security in the form of first mortgage bonds. The Supreme Court in that case aptly said:

> "* * * when a purchaser has possession and the right to gain the title by payment, he cannot complain of a bargain by which he binds himself to pay and is not to get the title until he does."

If the contract between appellant and appellee was a conditional sale, then the ownership of the cruiser did not pass to the appellee, if the decisions of the Supreme Court are to be followed, and we respectfully submit there is no alternative.

While this court in its opinion refers to the agreement as a "conditional agreement for the sale by appellant to appellee of the boat" (opinion p. 1), it says "The relationship between the parties was merely that of buyer and seller" (opinion p. 5).

The decisions, cited in our principal brief to the proposition that under a conditional sale contract the ownership of the goods does not pass to the vendee, are

not referred to in the opinion. We do not for that reason claim they were overlooked. The effect, however, of those holdings, we submit, has been overlooked for the reason that the *ratio decidendi* is that the seller in the case at bar reserved "bare legal title" *only* and that this *limited* reservation was insufficient to make the seller an "owner of any vessel" within the meaning of the statute.

On page 2 of the printed opinion this court stated:

> "By the terms of the agreement the bare legal title to the boat was retained by appellant until the purchase price of $14,039.03 was paid."

Again on page 5 this court stated:

> "Appellant merely retained the bare legal title of the boat as security for the unpaid portion of the purchase price."

Finally this court stated on page 6:

> "Under such circumstances, to permit appellant to limit its liability on the ground that it holds a bare legal title by reason of a conditional sale, which appellant must be considered as admitting is a mere security for the unpaid purchase price, we think is going further than the statute warrants."

The *implication* in the use of the words "bare legal title" is that the contract, though referred to as a "conditional agreement for the sale", was not in fact a true conditional sale, and that notwithstanding the name given it, the ownership of the vessel in fact passed to the vendee.

Under the law the contract is either a contract of conditional sale or it is a sale with a mortgage back as security for the purchase price. It must be one or the other. It cannot be both. Under the decision of the United States Supreme Court, *Bierce* v. *Hutchins*, 205

U. S. 340, (Appellant's Original Brief, p. 19) the contract must, we submit, be held to be a conditional sale and not a sale with a mortgage back. If it is a conditional sale, the ownership of the boat did not pass thereby to the vendee but remained in the vendor.

R. S. Sec. 4283 provides that the liability of the "owner" of any vessel may be limited.

If the contract in question was a conditional sale contract, then there is no escape from the proposition that the ownership of the vessel did not pass to the vendee and that the American Car and Foundry Company was the "owner" of the vessel.

Aside from the importance of the decision of this court to the parties involved, this decision will be of tremendous importance in admiralty law generally upon the proposition as to whether a conditional vendor is an "owner", and whether the well established rule at common law that a conditional vendor is an "owner" is not the rule in admiralty, but that instead the rule in admiralty is that a conditional sale must be construed as a mortgage.

The conditional sale is set forth in the libel. Its construction is a matter of law. If it is a conditional sale contract and the court is of the opinion that notwithstanding it is a conditional sale, nevertheless, appellant was not the owner of the boat, we submit that the court should clarify its decision by directly holding that the law of conditional sales does not apply in admiralty insofar as reserving ownership of the property to the vendor is concerned. Upon a reconsideration of the question, we do not believe this court intended to so hold.

To assist the court in construing the instrument, we refer to the following material provisions of the condi-

tional sale agreement which we think must have been overlooked. The agreement was not a bill of sale.

Paragraph I of the Agreement begins:

> "The Seller agrees to sell and the Purchaser agrees to buy* * *."

The seller still remained the owner of the boat. The ownership of the boat did not pass to the buyer upon the execution of the instrument. It did not pass upon the delivery of the boat and prior to the time of the accident.

The agreement provided in paragraph 3:

> "The delivery to and acceptance of the boat by Purchaser shall not vest in Purchaser any title thereto or right therein."

And further:

> "* * * the title to and *ownership* (italics ours) of the boat shall not pass to or vest in Purchaser but shall remain and be in Seller."

After delivery of the boat and at the time of the accident, the purchaser had no insurable interest in the boat for the entire amount of the purchase price. He was not the owner of the boat and, therefore, could not insure it for the entire purchase price. Paragraph 4 of the agreement so recognized the ownership in the seller and provided that possession of the insurance policies with full marine coverage, ordered by the buyer, be placed in the possession of the seller, with loss, if any, payable to the seller, as its interest may appear. See *The Eddie*, 8 Fed. (2d) 63 (S. D. N. Y.), where the seller of barges with title reserved by a conditional sale was held entitled to the proceeds of the insurance policy covering damages to the barges.

Paragraph 6 of the agreement restricted the assignment of the purchaser's rights under the contract, and also provided:

> "Purchaser shall not part with the possession or allow the boat to pass out of Purchaser's possession or control, except in the usual and ordinary operation of the boat."

Paragraph 7 provided that when payment in full was made by the purchaser and when the purchaser performed all of the obligations under the agreement, and also when the purchaser paid the seller the additional sum of $1.00, the seller agreed to execute and deliver to the purchaser a bill of sale

> "as evidence of the Purchaser's title to the boat and of Purchaser's compliance with the terms of this contract and as evidence that the *absolute ownership* (italics ours) of the boat is vested in Purchaser."

Paragraph 8 of the agreement further limited the *possession and use* of the boat by the purchaser and set forth the conditions under which the seller might *repossess* the boat after delivery and before payment of the purchase price was due.

These facts are fully set forth in appellant's brief, page 18, and in its reply brief, pages 2, 3, 4. Furthermore, the allegation that American Car and Foundry Company was the owner of the boat at the time of the accident was set forth clearly and frequently in the libel (Article I, IV, V, VIII, XI, XIII, XIV and XV).

The agreement not only *expressly* reserved *ownership* in the seller but also reserved many *incidents of ownership,* including control of the *use, occupation* and *operation* of the boat by the buyer. The agreement restricted the transfer by the buyer and his *dominion* and *control* over the boat until the entire amount of the purchase

price was paid. The seller was given the right to take possession of the boat after delivery and before payment of the purchase price, under certain conditions. The ownership of the boat had not passed from the seller to the buyer. A sale had not been consummated. Therefore, the statement that the conditional sale agreement reserved *merely* "bare legal title" in the seller is not in accordance with the facts. The decision of this court is based in large part upon that assumption, namely, that the legal effect of the conditional sale agreement was merely a reservation of "bare legal title" in the seller. We respectfully petition this court that such an assumption is erroneous. The facts should be re-examined and a rehearing should be granted.

The opinion of this court on page 5 states as follows:

> "Appellant merely retained the bare legal title of the boat as security for the unpaid portion of the purchase price. Indeed, the sixth paragraph of the sales agreement characterizes the contract as security for the unpaid note, and we think it must be so considered."

Does the court mean to hold that the contract was an absolute sale with a mortgage back and not a conditional sale at all?

We respectfully submit that the sixth paragraph does not change the character of the contract from that of a conditional sale into an absolute sale with a mortgage back.

The question whether a contract shows a conditional sale or an absolute sale with a mortgage back turns upon the ruling intention of the parties as disclosed by the entire contract, and not upon any single provision separately considered. Furthermore, there is nothing in the sixth paragraph inconsistent with the retention of ownership in the vendor pending payment of the notes.

Bierce v. *Hutchins*, 205 U. S. 340, 348; *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 272, 273. If it could be said that if the appellant had exercised the option to sell the notes and in the event of a transfer of the notes, and a default thereafter by the appellee in payment, to acquire and pay same, the exercise thereof would have been inconsistent with a retention of ownership (which would not, however, follow in view of the language of the contract) it is sufficient answer that the option was not exercised. As said in *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, in speaking of the effect of certain privileges given by the contract in that case, which if exercised would have been inconsistent with continued assertion of ownership in the vendor,

p. 273—

> "But the privilege was not exercised, and it hardly can be said that its mere reservation nullified the express words of the stipulation concerning the title. That it was not intended to do so seems manifest when the entire contract is considered."

Nor does the case of *Morgan's Assignees* v. *Shinn*, 82 U. S. 105, cited by this court (Opinion page 5) sustain the proposition that the contract in the case at bar is not a conditional sale. In that case Kelly being a one-fourth owner of a vessel made a bill of sale of his one-fourth interest to Shinn. It was asserted in the answer that the bill of sale was in fact a mortgage given to secure Shinn for a sum of money agreed to be lent by him to Kelly. The court said, p. 109,

> "We think the averment of the answer that the bill of sale was intended by the parties to be only a security, is sufficiently proved. The testimony of Shinn himself is positive. It is confirmed by that of the scrivener, and the testimony of both is entirely uncontradicted."

The above statement of that case is sufficient to show it has no application to the case at bar. The allegations of the libel and the conditional sale set forth in the libel in the case at bar cannot possibly be held to show that the contract was executed to secure appellant for money loaned to appellee.

To minimize the restricted use and occupation of the boat granted to the buyer until the entire purchase price was paid and to conclude that the seller was not the owner of the boat at the time of the accident (contrary to the *expressed* intention of the parties) is to destroy the conditional sale agreement. In a *practical* sense and in a *legal* sense the appellant was the owner of the boat at the time of the accident.

The court is misled, we think, by cases cited (opinion p. 5) to the effect that the vendor of a vessel under a conditional sale agreement is not liable for repairs or supplies furnished to the vessel, etc. Those cases, we submit, have no bearing upon the question here as to whether or not the conditional vendor is the "owner." The basis of liability or non-liability for repairs or supplies furnished to the vessel when the owner is not in possession *depends solely upon the question of agency and nothing else.* In those cases the question is whether or not the person in possession was the agent of the alleged owner and authorized to bind him by contract. And in that respect, there is no difference between cases of conditional sale and mortgages. *The same rule, to-wit, the rule of agency, applies in either case.*

Thus, in *The Boise Penrose,* 22 Fed. (2d) 919 (C. C. A. 2d), where the seller of a tug reserving title was held not liable for repairs, Judge Hand, delivering the opinion, said (p. 919):

> "The theory of the libelant is that the Barton Company, as vendee in possession, was agent of the

appellant, as vendor, to contract for the repairs. The question is of common-law liability, not of maritime law, and the situation is indistinguishable from that of supplies furnished, or repairs done, at the order of a mortgagor in possession."

(p. 920):

"To-day, so far as we can find, it is universally held that neither a mortgagee, nor a vendor reserving title, is as such liable for supplies or repairs. There must be some conduct other than the registry of title in his own name which estops him to deny that the mortgagor or vendee is his agent, or some proof of actual authority."

(Compare also the case of *The H. C. Grady,* 87 Fed. 232.)

The question before the court in the case at bar is not whether appellant is liable for some act of appellee, as agent of appellant, but whether or not appellant is the "*owner*" of the boat—whether or not the ownership of the boat passed to appellee by virtue of the conditional sale. That question, we submit, must be answered under the uniform holdings of the courts with respect to conditional sales, in accordance with the contention of appellant.

Even on this court's theory of bare legal title in appellant, would it not follow appellant was a part owner within Section 189 of U. S. Code Title 46; see *Flink* v. *Paladini,* 279 U. S. 59, 62.

The opinion of this court, page 6, states as follows:

"Appellant also relies on *The Milwaukee*, 48 F. (2d) 842, but in that case the agreement to sell was executory, and the performance was awaiting the doing of a future act."

The agreement to sell in the case at bar also "was executory, and the performance was awaiting the doing

of a future act," namely, the payment of money to the seller and the transfer of *all of the property* in the boat by the seller to the buyer. This court, we submit, apparently is of the opinion (notwithstanding the fact that the agreement clearly expresses the intention of the parties to be otherwise) that the conditional sale agreement in the case at bar was an agreement of sale, that the transaction was executed or that all of the property in the boat, except "bare legal title," had passed to the buyer. We have heretofore pointed out the errors of such conclusions. To correct these errors rehearing should be granted.

The intention of the parties as expressed in the agreement controlled the decision of the court in *The Milwaukee*. We quote from page 844 of that opinion:

> "In my judgment, it becomes quite immaterial whether, upon certain phases of the agreement or the plan, it was necessary to invoke the jurisdiction of the Commission. The proof shows that the parties regarded the plan as executory and as continuing to be executory until the Commission had determined the matters submitted to it. The question is not whether a title, speaking in strictness, remained in abeyance, but whether, notwithstanding words of present purchase and sale, the parties considered the whole arrangement as executory and as necessarily awaiting the doing of some future act upon which, it may well be said, it was all conditional.
>
> "I am satisfied that the petitioner is entitled to the benefit of the limitation act; and a decree may be entered accordingly."

One of the questions in issue in the case of *The Milwaukee* was whether the Grand Trunk Ferry Company was the owner of the ferry at the time of the accident. The agreement for sale of the ferry company to the Grand Trunk Railroad Company was made November 15, 1928, subject to the approval by the Interstate Com-

merce Commission. It was approved by the Interstate Commerce Commission November 8, 1929, some two weeks after the loss in question. The court held that the memorandum of sale dated November 15, 1928 (*The Milwaukee*, 48 F. (2d) 842, 844):

> "was a part of a plan which for more than a year remained conditional or executory, as between the two parties."

In like manner, the agreement in the case at bar was "conditional or executory, as between the two parties." The court in *The Milwaukee* nevertheless permitted Grand Trunk Ferry Company, as *owner*, to limit its liability for the loss in question. The case of *The Milwaukee* is not distinguishable in principle from the case at bar.

In the opinion of this court, page 6, it is said "to permit appellant to limit its liability on the ground that it holds a bare legal title by reason of a conditional sale, which appellant must be considered as admitting is a mere security for the unpaid purchase price, we think is going further than the statute warrants". We do not understand what the court means by the words "which appellant must be considered as *admitting* is a mere security for the unpaid purchase price". The libel does not admit it, nor is any such admission contained in any brief filed by appellant nor was any such admission made by proctors for appellant upon the oral argument before this court. We think possibly the court refers to the construction which the court puts upon the sixth paragraph of the contract, which we have heretofore discussed. As it is not clear, however, just what the court is referring to, we call the court's attention to it and assert that appellant has never admitted the contract was mere security for the unpaid purchase price. On the contrary, it was, and still is,

appellant's contention that ownership of the boat remained in appellant until the conditions of the contract, payment of the entire purchase price among other conditions, were performed.

We submit that under the uniform holdings of the courts the contract must be construed to be a conditional sale and not a mortgage.

With this conception of the relation of the parties—i. e. appellant as owner of the boat and appellee in possession with a right to obtain ownership only upon the ripening of the conditions mentioned in the contract—the difficulty in determining the right of appellant to limit liability disappears.

II.

The determination of the question whether or not the American Car and Foundry Company was the owner of the boat at the time of the accident is one legal conclusion. It is determined by a *construction of the written agreement.* The determination of the question whether or not the American Car and Foundry Company, as owner of the boat, may limit its liability under the statute is another legal conclusion. It is determined by a *construction of the statute.* This court, we submit, has confused the two questions.

On page 3 of the opinion, this court stated:

> "In determining whether appellant was the owner of the boat at the time of the accident it is quite necessary to refer to the conditions as they existed at the time of the enactment, as well as to subsequent decisions, in order to gather, if possible, the reasons which prompted the legislation and guided the courts' interpretation of it."

This method of "determining whether appellant was the *owner* of the boat at the time of the accident" is logically and legally untenable. However, in *construing the statute,* consideration of the reasons prompting the enactment of the legislation may aid in determining whether or not the appellant, *as owner,* comes within the provisions of the statute and may limit its liability.

This court stated (opinion, page 4):

> "Obviously, therefore, the purpose of the statute is to promote shipping or maritime commerce by limiting the liability, under certain conditions, of the owners of vessels who engage in it."

Is "shipping or maritime commerce" promoted when the manufacturer and owner of a vessel is thus subjected to an unlimited liability?

Is the only purpose of the statute "to promote shipping or maritime commerce"? The last quotation in this petition from the opinion of this court and the judgment of the court itself suggest an affirmative answer. However, the Supreme Court of the United States in the *Chero Cola* case, 271 U. S. 19, cited with approval by this court in its opinion on page 4, states in part as follows:

> "*Our statutes establishing the rule were enacted to promote the building of ships* * * *. (Italics ours.) The rule should be applied having regard to the purposes it is intended to subserve and the reasons on which it rests."

The statute in question was enacted for the purpose of promoting the "building of ships". The libel alleges that appellant is engaged in the manufacture of cruisers and the sale thereof by conditional sale, retaining ownership until the total amount of the purchase price has been paid. (R. 2) By virtue of the conditional sale contract, appellant remained the owner of the cruiser.

The additional fact that appellant was engaged in the business of manufacturing cruisers instead of eliminating appellant from the protection of the limitation statute, on the contrary shows that appellant falls directly within the purpose of the statute, to-wit, "to promote the building of ships".

We assert that the one condition, to-wit, that the one claiming the right to limit liability is the "owner", is all that is necessary to enable him to limit a liability in tort for damage caused by the vessel, regardless of whether he be engaged in shipping or in the building of ships. If however the business in which he is engaged is to be considered in determining his right to limit liability, the business of manufacturing the cruisers is of necessity promoted by a holding that appellant is within the statute, and the purpose of the statute is thereby subserved.

It is apparent from the libel that thousands of dollars were risked in the building of the particular cruiser. It is fair to assume that appellant has a substantial investment in such enterprise. If the building of such ships is to be promoted (and there is no question but that the boat in question is a vessel within the meaning of the statute) it can only be done by holding that the business of appellant falls within the purpose of the statute.

The quotation from the opinion of this court limiting the purpose of the statute "to promote shipping or maritime commerce" should be revised and considered with the quotation from the Supreme Court of the United States in the *Chero Cola* case, cited in the opinion of this court, to the effect that one of the purposes of the statute, *among others*, was "to promote the building of ships."

Furthermore, "the courts have uniformly held that a private vessel or yacht is within the limitation section", *notwithstanding the fact that it might not at the time of the accident or at any time be engaged in "shipping or maritime commerce."* (See appellant's brief, pages 23 and 24, and cases there cited.)

The resume of the cases on this question is contained in *The Muriel*, 25 Fed. (2d) 505, (appellant's brief, page 24). The judgment of this court is contrary to all of the cases there reviewed. We refer also *Lehigh Valley R. Co.* v. *Jones*, 50 Fed. (2d) 828 (C. C. A. 3rd Cir.), appellant's brief, page 22, at page 830:

> "We are concerned only with sec. 183 of the act which nowhere restricts the right of an owner to limit his liability to losses arising on a voyage but which generally in given circumstances, accords him the right to limit his liability for losses purely maritime."

We again refer to the opinion of this court, page 4, as follows:

> "Obviously, therefore, the purpose of the statute is to promote shipping or maritime commerce by limiting the liability, under certain conditions, of the owners of vessels who engage in it."

The requirement that owners of the vessel be engaged in "shipping or maritime commerce" at the time of the accident in order to be permitted to avail themselves of the limitation statute is not warranted by the adjudicated cases. All of the cases cited in this petition and taken from appellant's brief are contrary to such a proposition of law. Therefore, a rehearing should be granted to correct the error.

III.

The opinion of this court, pages 4-5, states as follows:

> "The liability which the statute limits is an imputed one, and the imputation is raised because of his ownership and the relationship which exists between himself and those in charge of the vessel."

The statute is not subject to the interpretation which the Court has put upon it. The statute does not say that the liability which may be limited is a liability based upon ownership. Under the statute any liability of the owner of any vessel for any loss, damage, etc., may be limited, *unless* the loss or damage occurred with the privity or knowledge of the owner. The only exception to the right of the owner to limit liability is that contained in the statute, provided, of course, the damage claimed is a tort for which the owner *could be* [though he need not be] sued in admiralty.

Under the exception stated in the statute, the owner, when any damage is caused by an alleged defect in the vessel which he owns, regardless of the manner in which the person damaged may ground his claim, or where he may elect to assert his claim, may limit his liability, if any, for the damage so caused, *unless* the damage was done, occasioned or incurred with "the privity or knowledge of such owner."

And (as pointed out in appellant's reply brief, pages 14, 15 and 16), when the owner is a corporation the privity or knowledge must be that of the managing officers of the corporation. Thus, if defects in a boiler are of such a character as can not be detected by an unskilled person, in other words, are not patent, and if the managing officers of a corporation have no actual knowl-

edge of the alleged defects, and if they have employed, in good faith, competent persons to inspect or pass upon the safety of the boiler and such persons so employed, although finding defects, have not reported them to the managing officers, in such case privity or knowledge cannot be imputed and liability may be limited. To that extent it may be said that the liability which the statute limits is an imputed one—in other words, when privity or knowledge must be imputed, the liability may be limited.

The imputation is not, as stated by this court in its opinion, raised because of ownership and the relation which exists between the owner and those in charge of the vessel. In the case of a defective boiler, or as in the case at bar, an alleged defect in the boat resulting in an explosion and damage, the imputation would arise if, in the case of a corporation, the privity or knowledge could not be shown to be that of the managing officers of the corporation but had to be imputed to them because of the knowledge of a subordinate. Where the corporation was in possession and control of the boat through its agents and servants, the imputation might arise from that relationship, since the only knowledge that could be imputed might appear to be only the knowledge of those in actual charge of the vessel. But the imputation is not confined exclusively to that relationship. The vessel might be in the charge and control of an independent contractor or, as in the case at bar, in charge of the conditional vendee. In either case it would be necessary to show that the owner had knowledge through its managing officers of the defect which resulted in the damage. If that knowledge depended solely upon the knowledge of subordinates acquired in building the boat or inspecting it before delivery, in other words, if it had to be imputed, the liability could be limited.

The libel alleges the loss and damage occurred without the privity or knowledge of appellant, and thus as against the exceptions, which operate as a demurrer, it states a case which *prima facie* entitles appellant to limit liability. If, after answer filed and evidence taken, it appears that the loss and damage were occasioned or incurred with the privity or knowledge of the managing officers of appellant, within the meaning of those words as defined by the authorities and is not simply imputed to appellant by reason of the knowledge, if any, of subordinates of defects, if any, in the boat causing the explosion thereon, then the liability for such damage can not be limited. But the case now before the court is not that but solely whether the libel is sufficient to require answer by the appellee.

IV.

The opinion of this court, page 6, states as follows:

> "It has been repeatedly held that the manufacture of boats is not a maritime enterprise."

The libel does not allege that appellee received personal injuries at a time when he was engaged in "the manufacture of boats" or when the appellant was engaged "in the manufacture of boats." The statement of the court correctly recites a principle of law, but the principle has no material relation to the issues in the case at bar. (See Appellant's Reply Brief, pp. 8 *et seq.*)

The opinion of this court, page 6, continues as follows:

> "It must be borne in mind that appellee's cause of action is not based on appellant's ownership. Appellant is not sued as an owner but as a manufacturer or builder, and the gist of the action is appellant's direct negligence in construction, equip-

> ment, and inspection, a failure of a duty which, so far as liability is concerned, is in no way connected with maritime enterprises or with appellant's ownership."

The record does not show the basis of appellee's cause of action on the common law side of the court. Reference to the common law action was first made in the brief of the appellee. Appellant's reply brief, pages 1, 2 and 18, called the attention of this court to the fact that appellee had gone outside the record, and also that if appellee wished to avail himself of any such facts they should be set up by way of answer. At the time of oral argument these matters again were called to the attention of this court.

We do not deny a suit at common law has been brought. Our position is that it is immaterial whether it has been brought or not or upon what theory it is brought. The right *prima facie* of appellant to limit liability must be determined from the libel. If the claim of appellee is based upon facts not alleged in the libel, it must be shown by answer, and for that reason we asserted in our reply brief and reassert that if the exact nature of the claim made in the common law suit is in any way material, the claim must be brought into the record by appellee by way of answer. Thus this court does not know whether in the common law suit appellee sets up the conditional sale contract or not. If required to answer the libel, appellee will be required to admit or deny the conditional sale contract set up in the libel.

The issue, and the only issue, before this court is well stated in the opinion, page 2:

> "The question presented by this appeal is whether the libel states sufficient facts to entitle appellant to limit its liability, if there be any liability."

The libel does not allege that a claim is being made against appellant because it is the owner of the boat, but alleges that it is the "owner", that the damage is claimed to have resulted to appellee's person and personal property by reason of an explosion occurring *on said boat* while it was being operated by appellee on the waters of Lake Michigan, and that hence under the statute appellant, being the owner of the boat, is entitled to limit its liability, if any, for the damage caused by the explosion.

Assuming that the claim of appellee will be based upon the theory of negligence in construction of the boat,

> "the negligence, of itself, furnishes no cause of action; it is *damnum absque injuria*, The damage is the substance and consummation of the injury, and from that alone springs the right of recovery",

(See Appellant's Reply Brief, pp. 9-10).

Hence, as we there pointed out, the claim for the damages suffered by appellee is a claim which could be asserted against appellant in admiralty. From which it necessarily follows that since appellant was the owner of the boat it is entitled to claim the benefit of the limitation statute *unless* appellee can show that the damage was occasioned or incurred with the privity or knowledge of appellant.

The mere fact that liability on another theory of law may be asserted at common law against appellant does not preclude appellant from availing itself of the limitation statute in admiralty. *Appellee by asserting a particular theory of liability in an action at law cannot repeal the limitation statute.*

The statement in the opinion that the theory of appellee's asserted liability (at common law) "is in no way connected with maritime enterprises or with appellant's ownership" does not change the *maritime* na-

ture of the *liability* or the *manner* of its limitation in admiralty. (See rules of practice for the courts of the United States in admiralty and maritime jurisdiction, rule 51.) Appellant need not be connected with "maritime enterprises" at the time of the accident in order to benefit from the limitation statute, as heretofore pointed out in the petition. (See also *The Muriel,* 25 Fed. (2d) 505, where the owner of the vessel was not in charge of the voyage at the time of the accident, and cases cited in appellant's brief, pages 22-23-24).

The alleged loss and injury to appellee occurred on navigable waters of the United States. The place where the loss and injury occurred of *necessity* makes the asserted liability a *maritime* liability. (See appellee's reply brief and cases cited, pages 9-10-11.) Thus, even in the common law action, the measure of liability, if any, will be in accordance with the rules of *admiralty* and not in accordance with those of the common law. This is so because the Constitution of the United States, Article III, Section II, provides for the uniformity of the Admiralty Law. (See *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469, 476, 477 and cases cited therein, *Chelentis* v. *Luckenback S. S. Co.,* 247 U. S. 372, *So. Pac. Co.* v. *Jensen,* 244 U. S. 205; appellant's reply brief, page 9.)

> "It was a maritime tort. The rights and obligations of the parties depended on and arose out of the maritime law. A proceeding to impose liability for such a tort is a cause in admiralty within the meaning of article 3, § 2 of the Constitution, triable in the United States courts sitting in admiralty." (*Spencer Kellog & Sons* v. *Hicks et al.,* 52 S. C. 450, 453.)

Therefore, we respectfully submit, that the language herein quoted from page 6 of the opinion of this court has no material relation to the issues presented in the

case at bar and has resulted in an erroneous judgment. Rehearing should be granted to correct these errors.

The opinion of the court, on page 6, further states:

> "We are further of the opinion that the statute purports to limit only that liability which arises from or grows out of ownership. In the instant case there is no such liability claimed, and until such liability is apparent there can be no limitation."

The limitation statute does not limit only that liability "which arises from or grows out of ownership." The statute limits "*the liability of the owner of any vessel*", that is, *any* liability.

If the interpretation of this court is correct, then the statute could easily be defeated in every case by claiming in a common law action any liability other than one "which arises from or grows out of ownership." In other words, all that appellee must do to defeat the operation of the statute, and thereby the intention of Congress, is to claim at common law some sort of liability other than one "which arises from or grows out of ownership" and, *ipso facto,* the limitation statute is made impotent. Rehearing should be granted to correct the error.

V.

We are convinced that rehearing should be granted for the reasons heretofore stated. However, if this court should decide otherwise, we respectfully call the attention of the court to the recent case of *Ex Parte Winfield A. Green,* 52 S. Ct. 602, decided May 23, 1932, wherein the Supreme Court held that when the issues of "privity or knowledge" and "the right to limit liability" are presented to any court, the admiralty court has "exclu-

sive jurisdiction" to decide all of the issues presented in such a controversy. The "question of the owner's right to limited liability having been raised, the cause became cognizable only in admiralty."

Therefore, in view of that case the trial court erred in dismissing the libel and should have proceeded to take evidence and decide the liability, if any, of this appellant *even though the trial court may have been of the opinion that there was no right to have liability limited.* See also *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 220; *Spencer Kellogg and Sons* v. *Hicks, et al.*, 52 S. Ct. 450, 453; *Admiralty Rule 53* (254 U. S. Appendix); *The 84-H*, 296 Fed. 427, 431. Complete relief was prayed for by appellant in the libel in article XIV.

Therefore, this court in trying the issues *de novo* (*Irbine* v. *The Hesper*, 122 U. S. 256, 266; *Reid* v. *American Express Co.*, 241 U. S. 544, 548; *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, 155; *Langnes* v. *Green*, 282 U. S. 531; *Munson S. S. Line* v. *Miramar S. S. Co.*, 167 Fed. 960) still has an opportunity to correct the errors to avoid needless litigation and circuity of action and to do justice between the parties.

CONCLUSION.

In conclusion may we say that in deference to the recognized ability of the Judges of this court we have a certain hesitancy in stating that the court has erred in its opinion and judgment.

At the same time not only is it our duty to our client but, as officers of this court, to this court as well, if we, in good faith, believe the court has erred to say so.

We are thoroughly convinced the court has erred. For that reason we have endeavored to point out, as briefly as the nature and importance of the questions involved will permit, the errors which we conscientiously believe exist, and it is our honest and sincere belief that a re hearing in this cause should be granted.

Respectfully submitted

CHARLES J. HARDY,
NOAH A. STANCLIFFE,
JOHN R. COCHRAN,
LEONARD F. MARTIN,
PAUL R. CONAGHAN,
Proctors for (Libellant) Appellant.

And on the same day, to-wit: On the fourteenth day of July, 1932, there was filed in the office of the Clerk of this Court a Proof of Service, which said Proof of Service is in the words and figures following, to -wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, A. D. 1931.

American Car and Foundry Company, a Corporation, (*Libellant*) *Appellant*, *vs.* H. A. Brassert, (*Respondent*) *Appellee*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable Geo. A. Carpenter, District Judge.

PROOF OF SERVICE.

Please take notice that on Thursday, July 14, 1932, we will file with the Clerk of the United States Circuit Court of Appeals, for the Seventh Circuit, twenty (20) copies of the petition for rehearing of American Car and Foundry Company, a corporation, appellant, in the foregoing entitled case, three (3) copies of which are presented herewith.

CHARLES J. HARDY,
NOAH A. STANCLIFFE,
JOHN R. COCHRAN,
Proctors for Appellant.

Received three (3) copies of this petition for rehearing this 14th day of July, 1932.

ROY O. WEST,
PERCY B. ECKHART,
LEWIS C. JESSEPH,
Proctors for Appellee.

Endorsed: Filed July 14, 1932. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-second day of July, 1932, there was filed in the office of the Clerk of this Court, an Answer to the Petition for a Rehearing, which said Answer to the Petition for a Rehearing is in the words and figures following, to wit:

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1931.

No. 4710

AMERICAN CAR AND FOUNDRY COMPANY, a Corporation, *Libelant and Appellant,* vs. H. A. BRASSERT, *Respondent and Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable Geo A. Carpenter, District Judge.

ANSWER TO PETITION FOR REHEARING.

MR. ROY O. WEST,
MR. PERCY B. ECKHART, and
MR. LEWIS C. JESSEPH,
Counsel for Appellee.

[illegible] PRINTING COMPANY, CHICAGO.

FILE

90

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1931.

No. 4710

AMERICAN CAR AND FOUNDRY COMPANY, a Corporation, *Libelant and Appellant,* vs. **H. A. BRASSERT**, *Respondent and Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable **Geo A. Carpenter**, District Judge.

ANSWER TO PETITION FOR REHEARING.

I.

Under Point I of its petition for rehearing, appellant contends that the court erred in holding appellant was not the "owner" of the boat within the meaning of the Limited Liability Statute of the United States.

The argument in the petition is largely a repetition of the contention found in appellant's brief on this question. On page 3 of the petition, however, after quoting from the opinion of the court, it is said:

> "The *implication* in the use of the words 'bare legal title' is that the contract, though referred to as a 'conditional agreement for the sale', was not in fact a true conditional sale, and that not-

withstanding the name given it, the ownership of the vessel in fact passed to the vendee."

The beneficial ownership and right to the enjoyment by possession of the motor boat had passed to the appellee. Under the terms of the agreement, he was expressly entitled to the possession and the right to use and enjoy the boat. He was in possession and was operating the boat at the time of the explosion. The "bare legal title" alone, was retained exclusively by appellant as security for the payment of the purchase price. It had no other or further interest in the boat.

On page 9 of the petition appellant cites the case of *The Boise Penrose,* 22 Fed. (2d) 919 (C. C. A 2d), as authority for the statement that "The court is misled, we think, by cases cited (Opinion, p. 5) to the effect that the vendor of a vessel under a conditional sales agreement is not liable for repairs or supplies furnished to the vessel, etc." Further, it is stated on the same page: "The basis of liability or nonliability for repairs or supplies furnished to the vessel when the owner is not in possession *depends solely upon the question of agency and nothing else.*"

This statement is not entirely accurate. The liability does not "depend solely upon the question of agency." It may arise out of agency, but at common law it does not exist because the mortgagee or vendor out of possession are not the *"owners"* of the vessel for the purpose of such liability. (See authorities cited in Appellee's Brief, pp. 13 to 19 incl.)

The theory of agency was advanced in the *Boise Penrose* case to establish the liability of a vendor out of possession, but the right to recover was denied. The theory had not been established by the evidence. We note with interest that the court in that case cited

with approval the cases of *Wendover* v. *Hogeboom*, 7 Johns. (N. Y.) 308, *Leonard* v. *Huntington*, 15 Johns. (N. Y.) 298, *Thorn* v. *Hicks*, 7 Cow. (N. Y.) 697, and *Morgan* v. *Shinn*, 15 Wall. 105. These cases are all cited in appellee's brief on the question of the liability of a mortgagee or vendor out of possession. *The Boise Penrose* case is distinctly an authority sustaining this court's opinion on this question.

On pages 10 to 13, inclusive, of the petition, it is argued that *The Milwaukee*, 48 Fed. (2d) 842, is controlling and should not have been distinguished by the court. While counsel for appellant may not admit it, *The Milwaukee* is in truth an authority for appellee.

In discussing the question of ownership under the statute limiting liability, the court said at page 842:

> "The judicial history of the act demonstrates that the question of ownership has been tested out, not by rigid inquiry respecting the muniments of title showing ownership to be absolute and unreserved, nor upon the mere form of transactions involving an interest in a vessel. *Rather is the inquiry directed to the relationship of one asserting himself, or charged to be, the owner with a view of ascertaining whether the relationship, whatever it is found to be, might reasonably furnish ground upon which a claim of liability for damage could be asserted.*"

This comment is clearly contrary to appellant's contention. Here, it seeks to test the question of ownership by reference only to muniments of title regardless of the question of liability. This, the court holds in *The Milwaukee* case is not the test.

In discussing the case of *Flink* v. *Paladini*, 279 U. S. 59, the court said in *The Milwaukee* case at the same page:

> "That case seems to indicate that whether or

> not one is to be deemed an 'owner' depends largely upon the possibility that he may be subjected to a liability which ordinarily is assertable against one having, or claiming to have, proprietorship or dominion over the subject of the proceeding. It negatives the thought that 'owner' of, or to 'own' a vessel means the situs of full title, interest, or dominion, and that nothing else is within the definition of the right or the range of the statute."

It seems to us, however, that the most significant facts in *The Milwaukee* case were continued possession and operation of the car ferry "Milwaukee" by the petitioner. Being in possession and engaged in operating the ferry, liability, if any, for the manner in which the ferry was operating rested upon the Car Ferry Company. But, in the instant case, appellant was not in possession and was not engaged in operating the motor boat at the time of the explosion and fire.

Let us suppose that under the conditional sales agreement in this case, appellee had purchased the motor boat for use upon Lake Michigan in transporting passengers and freight for hire; that the possession of the boat was delivered to appellee and he engaged in maritime commerce as above indicated; and that an accident occurred resulting in the loss of passengers and freight. Would the appellant appear in any court having jurisdiction and contend or confess that it was the owner of the motor boat? We apprehend not. And, further, we do not believe it could be held liable under such circumstances as an "owner." But appellee, being in possession and engaged in operating the motor boat, would be liable as "owner" if liability existed under the facts and circumstances here supposed.

II.

On page 23 of the petition, appellant cites the case of *Ex Parte Green*, 52 S. Ct. 602, as authority for the proposition that the admiralty court has "exclusive jurisdiction" in this case and other authorities to the same effect are cited on page 24 of the petition.

In each and all of the cases cited it appears that there was no controversy over the question of ownership; neither was there any question of the existence of liability that could be limited under the Limited Liability Statute in the absence of privity or knowledge.

In the instant case, however, it appears from the allegations of the libel that appellant was not the "owner" of the motor boat. It also appears from the allegations of the libel that since appellant's officers and agents were not in possession of the motor boat and were not operating it at the time of the explosion and fire, there is no liability upon appellant which can be limited, and, furthermore, it appears that the liability which appellee seeks to establish by the common law action is personal to appellant and therefore one which can not be limited.

The very facts, therefore, necessary to confer jurisdiction upon a court of admiralty and necessary to create a cause of action in admiralty, do not exist in this case, and the authorities cited by appellant are not in point.

It is respectfully submitted that the petition for rehearing should be denied.

ROY O. WEST,
PERCY B. ECKHART,
LEWIS C. JESSEPH,
Proctors for Appellee.

And afterwards, to wit: On the twenty-third day of July, 1932, there was filed in the office of the Clerk of this Court a Proof of Service, which said Proof of Service is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

No. 4710.

American Car and Foundry Company, a corporation,
Libelant and Appellant,
vs.
H. A. Brassert,
Respondent and Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
Honorable
Geo. A. Carpenter,
District Judge.

I have this day served a copy of Appellee's Answer to Petition for Rehearing in the above cause on Messrs. Knapp, Beye, Allen, Cochran and Cushing, counsel for appellants.

Dated this 22nd day of July, 1932.

LOWELL A. LEONARD.

Endorsed: Filed July 23, 1932. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in the Seventh Circuit on the fourth day of October, 1932, of the October Term in the year of our Lord one thousand nine hundred and thirty-two, and of our Independence the one hundred and fifty-seventh.

And afterwards, to-wit: On the thirteenth day of October, 1932, the following further proceedings were had and entered of record, to-wit:

Thursday, October 13, 1932.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. James H. Wilkerson, District Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

American Car and Foundry Company, a corporation,
4710 *vs.*
H. A. Brassert

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the seventeenth day of October, 1932, the Mandate of this Court issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

And afterwards, to-wit: On the twenty-fifth day of October, 1932, there was filed in the office of the Clerk of this Court, a Notice of Motion, which said Notice of Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, A. D. 1932.

American Car and Foundry Company, a corporation, (*Libellant*) *Appellant*, *vs.* H. A. Brassert, (*Respondent*) *Appellee*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable **Geo. A. Carpenter**, District Judge.

NOTICE OF MOTION.

To Messrs. West and Eckhart,
38 South Dearborn Street,
Chicago, Illinois.

Please take notice that on Tuesday, October 25, 1932, at 9:30 o'clock A. M., or as soon thereafter as counsel can be heard, we will present to the United States Circuit Court of Appeals for the Seventh Circuit a motion to stay the mandate in this cause, a copy of which is presented to you herewith.

JOHN R. COCHRAN,
CHARLES J. HARDY,
Proctors for Appellant.

Received a copy of this notice and motion this 24th day of October, 1932.

ROY O. WEST,
PERCY B. ECKHART,
LEWIS C. JESSEPH,
Proctors for Appellee.

Endorsed: Filed Oct. 25, 1932. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fifth day of October, 1932, there was filed in the office of the Clerk of this Court, a Motion to Stay Mandate, and Affidavit of Paul R. Conaghan in support of Motion, which said Motion and Affidavit are in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, 1932.

American Car and Foundry Company, a Corporation, (*Libellant*) *Appellant*, *vs.* H. A. Brassert, (*Respondent*) *Appellee*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable Geo. A. Carpenter, District Judge.

MOTION TO STAY MANDATE.

Now comes American Car and Foundry Company, a corporation, appellant in the foregoing entitled cause, by John R. Cochran and Charles J. Hardly, its proctors, and moves this Honorable Court that the mandate herein be stayed until the Supreme Court of the United States has disposed of the petition for a writ of certiorari or the appeal or writ of error in this cause.

Respectfully submitted,

JOHN R. COCHRAN,
CHARLES J. HARDY,
Proctors for Appellant.

State of Illinois, } ss.
County of Cook. }

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

American Car and Foundry Company, a Corporation, (*Libellant*) *Appellant*, *vs.* H. A. Brassert, (*Respondent*) *Appellee*. } No. 4710.

AFFIDAVIT.

PAUL R. CONAGHAN, being first duly sworn, on oath deposes and says that he is one of the proctors for the appellant, American Car and Foundry Company, a corporation, in the foregoing entitled cause and that he is charged with the preparation of the records and briefs in said cause to be filed in the Supreme Court of the United States and that said appellant intends to apply to the Honorable Judges of the Supreme Court of the United States for a writ of certiorari or appeal or writ of error in said cause.

PAUL R. CONAGHAN.

Subscribed and sworne to before me this 24th day of October, 1932.

G. A. DINSMOOR,
(Seal) *Notary Public.*

Endorsed: Filed Oct. 25, 1932. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fifth day of October, 1932, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 25, 1932.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

American Car and Foundry Company, a corporation,
4710 *vs.*
H. A. Brassert

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now comes this day counsel for appellant and presents a motion for recall and stay of the Mandate of this Court pending a petition to the Supreme Court of the United States for a writ of certiorari.

On consideration whereof: It is now here ordered that the Mandate in this cause be, and the same is hereby recalled and stayed until the further order of this Court.

It is further ordered that counsel for appellant proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States and, upon the filing of said petition file in this Court proof of the filing of said petition in said Court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing Printed pages, numbered from 27 to 82, inclusive, contain a true copy of the proceedings had and papers filed (excepting the briefs of counsel) in the case of

American Car and Foundry Company, a corporation,
Appellant,

vs.

H. A. Brassert,
Appellee,

No. 4710, October Term, 1931, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of November, A. D. 1932.

FREDERICK G. CAMPBELL,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 13, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
FILED
JAN 13 1933
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No. 623

AMERICAN CAR AND FOUNDRY COMPANY,
a Corporation,

Petitioner,

vs.

H. A. BRASSERT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

CHARLES J. HARDY,
NOAH A. STANCLIFFE,
JOHN R. COCHRAN,
Proctors for Petitioner.

LEONARD F. MARTIN,
PAUL R. CONAGHAN,
Of Counsel.

CHICAGO LAW PRINTING CO., 40 S. CLINTON ST. FRANKLIN 6521

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No.

AMERICAN CAR AND FOUNDRY COMPANY,
a Corporation,

Petitioner,

vs.

H. A. BRASSERT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioner, American Car and Foundry Company, respectfully represents that it is aggrieved by the final judgment of the United States Circuit Court of Appeals for the Seventh Circuit affirming the decree of the United States District Court for the Northern District of Illinois, Eastern Division, which decree dismissed the libel in admiralty filed in the said District Court by your petitioner.

The libel sought to limit the liability, if any, of your petitioner for damages to respondent's person and property, and to others, resulting from an explosion and fire occurring on August 18, 1930, on the cruiser "Orion", a 38-foot gasoline propelled cruiser, while it was being operated by respondent on the waters of Lake Michigan.

The "Orion" was in the possession of respondent pursuant to a conditional sale contract entered into between your petitioner and respondent, under which ownership of the boat was reserved in your petitioner until the boat was paid for. At the time of the accident the boat had not been fully paid for and the conditions of the conditional sale contract were in full force.

Allegations of the Libel.

The libel (R. 2-14) alleges that American Car and Foundry Company, your petitioner, is engaged in the manufacture and sale of gasoline propelled yachts and cruisers; that in the usual course of business ownership of such boats is retained by American Car and Foundry Company until the purchaser has made payment of the total amount of the purchase price (R. 2); that the respondent, Brassert, entered his written order with petitioner for a cruiser, which order provided that the cruiser was subject only to the warranty against defects in workmanship and material and that the obligation of your petitioner under this or any implied warranty was limited to the replacement at petitioner's plant of parts returned within 90 days following date of shipment, and also provided that title to the cruiser and its equipment should remain in petitioner until fully paid for (R. 3-4); that the cruiser ordered, named "Orion", was shipped to respondent at Chicago and there received by respondent in good order and con-

dition; that the cruiser was of modern design and construction, well suited for the uses represented and intended, and was sturdy, safe and seaworthy (R. 4-5).

The libel sets forth in full the conditional sale agreement (R. 5-9) entered into between petitioner and respondent on June 20, 1930, by the terms of which respondent acknowledged receipt of the boat in good order and condition and agreed to pay petitioner therefor, the sum of $14,039.03 as follows: $3,000 accompanying the order (receipt of which was acknowledged), $4,000 on delivery of the boat, and the balance in one installment of $7,039.03 in 90 days after delivery of the boat, which installment was required to be evidenced by the promissory note of respondent to the order of your petitioner, bearing date of June 20, 1930, and maturing on the due date of said installment (R. 5-6). The conditional sale agreement expressly provided that delivery to and acceptance of the boat by respondent should not vest in respondent any title thereto or right therein until payment by respondent of the balace of the purchase price; that until all obligations of respondent were performed the title to and ownership of the boat should not pass to or vest in respondent, but should remain and be in your petitioner; that respondent was entitled to possession and use of the boat from its delivery but only upon and subject to all the terms and conditions of the conditional sale agreement; and that upon payment in full by the respondent of the purchase price and of all notes issued thereunder and performance by respondent of his several obligations mentioned in the contract and upon payment by respondent to petitioner of the further sum of $1.00, petitioner would execute and deliver to respondent a bill of sale as evidence that the absolute ownership of the boat was vested in respondent (R. 6-7). The contract also provided for the remedies of the

petitioner in the event of default by respondent in performing his obligations under the contract (R. 7-9).

The libel further alleges that on August 18, 1930 the conditional sale agreement was in full force and effect and there was owing to petitioner, as owner, from respondent the said sum of $7,039.03 due 90 days after June 20, 1930, as set forth in the agreement; that on August 18, 1930 while the cruiser was being operated by respondent on the waters of Lake Michigan, at a point about three miles from the shore opposite Fort Sheridan, Illinois, an explosion is alleged to have occurred, followed by fire, and that the cruiser burned to the water's edge, was sunk, and became a total loss; that respondent and two other persons, whose names are unknown, were in the cruiser at the time of the accident; that respondent claims to have suffered personal injuries and damages to certain personal property on the boat (R. 9-10); that all of the injuries and damages to persons on board and damage to property were occasioned and incurred without the privity or knowledge of petitioner, the owner of said cruiser; that the insurer of the cruiser and property on board and other persons who claim to have been on board of the cruiser at the time of the loss may make claim for damages; that all of such damages were occasioned and incurred without the neglect, fault, privity or knowledge of petitioner or its officers or agents (R. 11); and that petitioner is entitled to have its liability, if any, for any such losses and damages limited to the amount or value of the interest of petitioner as owner in said cruiser immediately after said loss, as provided by Section 4283 of the Revised Statutes of the United States (R. 12-14).

Exceptions of Respondent, and Decree of District Court.

The respondent filed exceptions to the libel, alleging, inter alia, that the libel did not disclose that your petitioner was the owner of the boat within the meaning of the United States statutes permitting limitation of liability and prayed that the libel be dismissed (R. 16-17).

The District Court on November 16, 1931 sustained the exceptions and allowed petitioner ten days to amend its libel or stand on same (R. 18). Petitioner elected to stand on its libel and the District Court on November 30, 1931, on motion of respondent, entered a decree dismissing the libel (R. 18).

Appeal to Circuit Court of Appeals.

An appeal was taken by petitioner to the United States Circuit Court of Appeals for the Seventh Circuit (R. 19-22), which affirmed the decree of the District Court on June 24, 1932 (R. 37). On July 14, 1932, petitioner filed its petition for a rehearing (R. 37-65), which was denied by the Circuit Court of Appeals on October 13, 1932 (R. 78).

Reasons for Granting the Writ.

Your petitioner respectfully represents that the Circuit Court of Appeals erred in affirming the decree of the District Court and in its holdings as hereinafter stated, and that there are the following special and important reasons why the petition for a writ of certiorari should be granted:

1. The Circuit Court of Appeals holds that where the conditional vendee of a vessel sold under a conditional sale

contract, reserving ownership in the vendor until the balance of the purchase price is paid, is in possession of and using the vessel pursuant to the terms of such contract, the conditional vendor is not an "owner" within the meaning of Section 4283 of the Revised Statutes (46 U. S. C., Section 183);

(a) In so holding, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by This Court;

(b) The holding that the conditional vendor is not an owner within the meaning of Section 4283 of the Revised Statutes is probably in conflict with the decision of This Court in the case of *Flink* v. *Paladini*, 279 U. S. 59;

(c) The holding is probably in conflict with the decisions of This Court holding that under a conditional sale of property the vendor remains the owner. See *Wm. W. Bierce* v. *Hutchins*, 205 U. S. 340, 348; *Bailey* v. *Baker Ice Machine Company*, 239 U. S. 268.

(d) In so holding the Circuit Court of Appeals has decided an important question of general law, relating to ownership of property sold under conditional sale, in conflict with the weight of authority. See *Gilbert* v. *Nat. Cash Register Co.*, 176 Ill. 288, 294-295; *Rivara* v. *James Stewart & Co.*, 241 N. Y. 259, 149 N. E. 851 (aff'd 274 U. S. 614); *Interstate Ice Corp.* v. *United States Fire Ins. Co.*, 243 N. Y. 95, 152 N. E. 476; *Harkness* v. *Russell*, 118 U. S. 663.

2. In holding that the owner of a vessel can not limit liability under Section 4283 of the Revised Statutes unless the owner is engaged in shipping or maritime commerce, the Circuit Court of Appeals has decided an im-

portant question of Federal law which has not been, but should be, settled by This Court.

3. In holding that an owner of a vessel cannot limit liability under Section 4283 of the Revised Statutes, unless there exists between the owner and those in charge of the vessel the relationship of agency or master and servant, or unless the owner is directly or indirectly connected with the management and control of the vessel, the Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by This Court.

4. The Circuit Court of Appeals also holds that, although the loss and damage to respondent occurred upon the waters of Lake Michigan, inasmuch as respondent is predicating his claim against your petitioner for such loss and damage upon alleged negligence on the part of your petitioner in the manufacture and building of the vessel, your petitioner cannot have its liability, if any, limited under Section 4283 of the Revised Statutes.

(a) In so holding the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by This Court.

(b) Such holding is probably in conflict with the decisions of This Court and of the Circuit Court of Appeals of the Seventh Circuit, holding that the jurisdiction of admiralty is determined by the place where the injury occurred, regardless of where the negligent act was done. See *The Plymouth*, 3 Wall 20, 36; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 58-59; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469, 476; *Rundell* v. *LaCampagnie*, 100 Fed. 655, 657 (C. C. A. 7th Cir.).

5. In holding that the only liability which the statute limits is a liability which arises from or grows out of own-

ership, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by This Court.

6. Even though liability could not be limited, the affirmance of the decree dismissing the libel is probably in conflict with the decision of This Court in *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207.

Wherefore, your petitioner respectfully prays:

That a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding said court to certify and send to This Court a full and complete transcript of the record and all of the proceedings in the cause, being Cause No. 4710 in said Circuit Court of Appeals, to the end that said cause may be reviewed and determined by This Court as provided by law, and that your petitioner may have such other and further relief as to This Court may seem appropriate and in conformity with the law.

AMERICAN CAR AND FOUNDRY COMPANY,
A CORPORATION.

CHARLES J. HARDY,
NOAH A. STANCLIFFE,
JOHN R. COCHRAN,
Proctors for Petitioner.

LEONARD F. MARTIN,
PAUL R. CONAGHAN,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No.

AMERICAN CAR AND FOUNDRY COMPANY,
a Corporation,
Petitioner,

vs.

H. A. BRASSERT,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is reported in *American Car & Foundry Co.* v. *Brassert,* 61 F. (2d) 162. The opinion also appears at pp. 31-36 of the Record.

II.

Jurisdiction of This Court.

This Court is authorized to issue a writ of certiorari herein under sec. 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., sec. 347), provided application therefor is duly made within three months after the entry of the judgment of the Circuit Court of Appeals, as required by the Act of February 13, 1925 c. 229, sec. 8(a) (28 U. S. C., sec. 350).

The judgment of the Circuit Court of Appeals was rendered June 24, 1932 (R. 37). Under Rule 25 of the Circuit Court of Appeals for the Seventh Circuit, a petition for rehearing may be filed within twenty days after entry of judgment. A petition for rehearing was filed by your petitioner on July 14, 1932 (R. 37-39), and denied by the court below on October 13, 1932 (R. 78). The running of the time within which application for a writ of certiorari may be made to This Court is suspended by the seasonable filing of a petition for rehearing in the court below, *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498.

By the United States Constitution (Art. 3, Sec. 2, cl. 1) the judicial power is extended to all cases of admiralty and maritime jurisdiction, and by the judicial code (28 U. S. C. sec. 371) exclusive jurisdiction of such cases is vested in the United States courts. The construction of R. S. sec. 4283 (46 U. S. C. 183) presents a federal question, to be determined in accordance with the rule of uniformity which has been declared a dominant requirement for admiralty law, *Flink* v. *Paladini,* 279 U. S. 59, 63.

Under Rule 38(5) of This Court a review on writ of certiorari will be granted where there are special and important reasons therefor. There are special and important

reasons why the cause should be reviewed by This Court on writ of certiorari. Those reasons are set forth in the petition (supra, p. 5), and in the interest of brevity will not be repeated here.

III.

Statement of the Case.

This case presents the question as to whether the libel in admiralty filed by your petitioner in the District Court (R. 2-14) states facts sufficient to invoke Section 4283 of the Revised Statutes relating to limitation of liability by the owner of a vessel. Respondent filed exceptions to the libel (R. 16-17) which were sustained by the District Court, and a decree was entered by the District Court dismissing the libel (R. 18). From this decree your petitioner appealed (R. 19-20) to the Circuit Court of Appeals for the Seventh Circuit, where the decree of the District Court was affirmed (R. 37).

The allegations of the libel have been set forth in the petition for certiorari (supra, p. 2), and in the interest of brevity will not be repeated here.

IV.

Specification of Errors.

1. The court below erred in deciding that the conditional vendor of a vessel, possession of which is delivered to the conditional vendee pursuant to the terms of the contract, is not an owner of the vessel within the meaning of R. S. sec. 4283 (46 U. S. C. sec. 183).

2. The court below erred in holding that the owner of a vessel cannot limit liability under R. S. sec. 4283, unless the owner is engaged in shipping or maritime commerce.

3. The court below erred in holding that the owner of a vessel cannot limit liability under R. S. sec. 4283 unless there exists between the owner and those in charge of a vessel the relationship of agency or master and servant, or unless the owner is directly or indirectly connected with the management and control of the vessel.

4. The court below erred in holding that since respondent is predicating his claim against your petitioner for the loss and damage suffered by the explosion of the vessel upon alleged negligence in the manufacture of the vessel, your petitioner cannot limit liability under R. S. sec. 4283.

5. The court below erred in holding that the only liability which R. S. sec. 4283 limits is a liability which arises from or grows out of ownership.

6. The court below erred in affirming the decree of the District Court dismissing the libel.

SUMMARY OF ARGUMENT.

1. **Your petitioner was the owner of the vessel "Orion" within the meaning of Section 4283 of the Revised Statutes.**

The truth of the allegations of the libel are admitted by the exceptions filed by respondent.

The libel shows respondent was in possession under a conditional sale contract which reserved ownership in your petitioner and that the contract was in full force at the time of the accident.

The word "owner" is to be taken in its broad and popular sense. It is well settled that the conditional vendor of property remains the owner thereof.

2. **The court below erred in holding that the owner of a vessel cannot limit liability under R. S. sec. 4283, unless the owner is engaged in shipping or maritime commerce.**

The statute contains no such qualification. Its purpose was to encourage the building of ships, as well as the business of navigation.

3. **The court below erred in holding that an owner of a vessel cannot limit liability under R. S. sec. 4283, unless there exists between the owner and those in charge of the vessel the relationship of agency or master and servant.**

The statute contains no such qualification.

4. The court below erroneously holds that because the theory of respondent's claim against your petitioner is for negligence in constructing the boat there can be no limitation of liability under R. S. sec. 4283.

The jurisdiction of admiralty is determined by the place where the injury was sustained regardless of where the negligent act, if any, may have been done.

5. The court below erred in holding that the only liability which the statute limits is an imputed liability which arises from or grows out of ownership.

The statute covers any liability for loss or damage occurring upon the navigable waters of the United States.

6. Even though liability could not be limited the court below erred in dismissing the libel.

V.

ARGUMENT.

1. Your petitioner was the owner of the vessel "Orion" within the meaning of Section 4283 of the Revised Statutes.

The allegations of the libel (the truth of which are admitted by the exceptions filed by respondent, *The Muriel*, 25 F. (2d) 505), show that on August 18, 1930, respondent was in possession of and operating the cruiser on the navigable waters of Lake Michigan. The cruiser at the time was occupied by respondent and two other persons. An explosion occurred, the cruiser caught fire, was sunk and became a total loss. The libel shows that respondent claims to have suffered personal injury and property damage, and that others claim or may claim damages (R. 10-11).

Respondent was at the time in possession of and using the cruiser under and pursuant to the terms of a conditional sale contract entered into between your petitioner and respondent on June 20, 1930 (R. 5). This contract expressly provided that ownership of the cruiser should not pass to respondent but should be and remain in your petitioner until the respondent had paid the balance of the purchase price of the cruiser and had performed all of his obligations under the contract (R. 6-7). The contract provided that respondent should pay the balance of the purchase price within ninety (90) days and that he should

execute his note therefor (R. 5-6). Pursuant to the contract, respondent did execute his note for the balance, $7039.03, due September 20, 1930. At the time of the explosion the contract was in full force and effect (R. 9-10).

Section 4283 of the Revised Statutes, (46 U. S. C., Section 183) provides as follows:

> "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

The statute expressly provides that "the liability of the *owner* of any vessel" may be limited. The words of the statute are clear and unambiguous. No qualifying words are employed to limit the meaning of "*owner*" to any other than the usual, customary legal import of the word itself. The word is not technical and must be taken in its broad and popular sense as held by This Court in *Flink* v. *Paladini*, 279 U. S. 59. In that case Flink suffered an injury on a tugboat belonging to A. Paladini, Inc., a California corporation. He sued the corporation and its stockholders, seeking to hold the latter under the California laws, which provided stockholders should be personally liable for the debts and liabilities of the corporation. It was contended that the stockholders of the corporation were not the owners of the boat and that their liability was an independent

one voluntarily assumed by contract. This Court held that the stockholders were owners and could limit their liability.

If the word "owner" can be held to include stockholders of a corporation, then certainly it must include within its meaning the vendor in a conditional sale, since it is well recognized that the vendor under a conditional sale contract, such as the contract in the case at bar, remains the owner subject to the vendee's right to acquire title by complying with the stipulated conditions of the contract, *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 271. To hold, as does the court below (R. 35-36), that there is a difference destroys "the uniformity which has been declared a dominant requirement for admiralty law," *Flink* v. *Paladini*, 279 U. S. 59, 63.

Needless to say, there is nothing peculiar to the property right in a vessel making inapplicable to a conditional sale thereof the well settled principles respecting the ownership of personal property sold under conditional sale. Conditional sales of vessels have been recognized by This Court and by other circuit courts of appeal; *Stewart & Co.* v. *Rivara*, 274 U. S. 614 (Affirming 241 N. Y. 259; 149 N. E. 851.); *The Eddie*, 8 F. (2d) 63 (S. D. N. Y.), affirmed 8 F. (2d) 65 (C. C. A. 2d).

The Circuit Court of Appeals in its opinion holds that the delivery of possession to the conditional vendee and the giving by the conditional vendee of a note for the unpaid balance of the purchase price, as required by the contract, destroys the right of the conditional vendor to claim ownership. This Court has expressly held the contrary with respect to conditional sales of property, *Wm. W. Bierce* v. *Hutchins*, 205 U. S. 340, 348; *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 272, 273.

The Circuit Court of Appeals holds (R. 35) that the sixth paragraph of the conditional sale agreement makes the contract simply security for the unpaid note. The sixth paragraph gave to the vendor certain privileges (R. 6-7). If it could be said the exercise of such privileges would have been inconsistent with an assertion of ownership by the vendor, it is sufficient answer that the privileges were not exercised, and the privileges given by that paragraph were manifestly not intended to nullify the express words of the contract concerning ownership, *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268 at p. 273.

The holding of the Circuit Court of Appeals that the contract was in effect a mortgage is also in conflict with the weight of authority, *Gilbert* v. *Nat. Cash Register Co.*, 176 Ill. 288, 294-295; *Rivara* v. *James Stewart & Co.*, 241 N. Y. 259, 149 N. E. 851 (aff'd 274 U. S. 614); *Interstate Ice Corp.* v. *United States Fire Ins. Co.*, 243 N. Y. 95, 152 N. E. 476; *Harkness* v. *Russell*, 118 U. S. 663, where This Court, after a full examination of the adjudged cases, recognized the general rule, that—as between the parties to a conditional sale—where the buyer is bound to do anything as a condition on which the passing of the property depends, the property will not pass until the condition be fulfilled even though the goods may have been delivered into the possession of the buyer.

That the provisions of the contract stamp it unmistakably as a contract of conditional sale and not a mortgage is clear. Nor does the case of *Morgan's Assignees* v. *Shinn*, 15 Wall (82 U. S.) 105, cited by the Circuit Court of Appeals in its opinion (R. 35) hold the contrary. In that case Kelly, being a one-fourth owner of a vessel, made a bill of sale of his one-fourth interest to Shinn. Morgan's assignees brought suit against Shinn to enforce contribution for repairs to the vessel, averring Shinn was the

owner of one-fourth part of the vessel. Shinn denied this averment of ownership and asserted in his answer that the bill of sale was in fact a mortgage given to secure him for a sum of money agreed to be lent by him to Kelly. The court said, p. 109,

> "We think the averment of the answer that the bill of sale was intended by the parties to be only a security, is sufficiently proved. The testimony of Shinn himself is positive. It is confirmed by that of the scrivener, and the testimony of both is entirely uncontradicted."

In support of its holding that a conditional vendor is not an owner, the Circuit Court of Appeals in its opinion (R. 35) says that the vendors of a vessel under a conditional sales agreement are not liable as owners for loss of freight or for repairs or supplies furnished to the vessel. Cases so holding have no bearing upon the question at bar. The basis of liability or non-liability for repairs or supplies furnished to the vessel when the owner is not in possession depends solely upon whether or not the person in possession is the agent of the alleged owner and authorized to bind him by contract, in which respect there is no difference between cases of conditional sales and mortgages, *The Boise Penrose*, 22 F. (2d) 919, 920, (C. C. A. 2d).

In support of our contention that a conditional vendor is an owner within the meaning of R. S. sec. 4283, we call the Court's attention to the case of *The Milwaukee*, 48 F. (2d) 842 (D. C. E. D. Wis.), referred to by the court below in its opinion (R. 36). In that case the Grand Trunk Milwaukee Car Ferry Company was permitted to limit its liability as owner of the car ferry Milwaukee, although the

evidence showed that an agreement had been entered into between the Ferry Company and the Grand Trunk Railroad Company to sell the ferry to the Railroad Company. The agreement was subject to the approval of the Interstate Commerce Commission and was, therefore, conditional. The court in that case pointed out (48 F. (2d) at page 844) that if the case were before the court upon an ordinary proceeding charging the Ferry Company as owner of the boat it would be difficult for the Ferry Company to evade or avoid claim of ownership. In that case the vendor was in possession, but upon the construction of the statute it supports the claim of your petitioner that it is an "owner" within the meaning of the statute.

2. The court below erred in holding that the owner of a vessel cannot limit liability under R. S. sec. 4283, unless the owner is engaged in shipping or maritime commerce.

The statute (R. S. sec. 4283, 46 U. S. C. sec. 183) does not provide that the owner of a vessel in order to limit liability thereunder must be engaged in shipping or maritime commerce. The Circuit Court of Appeals, however, says obviously that was the purpose of the statute (R. 34).

The purpose of the statute was to promote the building of ships, to encourage the business of navigation, *Evansville Co.* v. *Chero Cola Co.*, 271 U. S. 19, 21; "to encourage shipbuilding and to induce the investment of money in this branch of industry", *Hartford Accident Co.* v. *Sou. Pacific*, 273 U. S. 207, 214; see also *The Wheeler-Shipyard Hull*, 1 F. Supp. 402, 406, (D. C. E. D. N. Y.)

The libel alleges that your petitioner during several years last past was, and now is, engaged in the manufac-

ture and sale of gasoline propelled yachts and cruisers, and that in the usual course of business after delivery to the purchaser, ownership of such boats so manufactured is retained by your petitioner until the purchaser has made payment of the total amount of the purchase price (R. 2). Your petitioner, as a builder of ships, thus squarely comes within the purpose of the statute. The statute nowhere restricts the right of an owner to limit his liability to losses resulting from his engaging in shipping or maritime commerce, but generally, in given circumstances, accords him the right to limit his liability for losses purely maritime. Compare *Lehigh Valley R. Co.* v. *Jones,* 50 F. (2d) 828, 830 (C. C. A. 3d).

3. The court below erred in holding that an owner of a vessel cannot limit liability under R. S. sec. 4283, unless there exists between the owner and those in charge of the vessel the relationship of agency or master and servant.

The Circuit Court of Appeals says (R. 35) that your petitioner had nothing whatever to do either directly or indirectly with the management, operation or control of the boat and hence concludes that there was no such relationship between your petitioner and respondent, who was in possession of and using the boat, as to permit your petitioner to claim limitation of liability.

The right of the "owner" of a vessel to limit liability under R. S. sec. 4283, 46 U. S. C. sec. 183, is not made to depend upon the relationship between the owner and those in charge of the vessel, either by any words in the statute or by its purpose (see discussion of purpose of the statute under Point 2, supra.).

Moreover, the Circuit Court of Appeals overlooked the fact that the operation and use of the boat by respondent was under and pursuant to the terms of the conditional sale contract (R. 6-7).

4. The court below erroneously holds that because the theory of respondent's claim against your petitioner is for negligence in constructing the boat there can be no limitation of liability under R. S. sec. 4283.

Neither the libel nor the exceptions thereto show that any suit has been commenced at law against your petitioner, although it is so stated to be the fact by the Circuit Court of Appeals in its opinion (R. 32, 36). The fact that a suit had been commenced by respondent was called to the court's attention by respondent in its brief in the Circuit Court of Appeals and upon oral argument. In the petitioner's petition to the Circuit Court of Appeals for rehearing (R. 60), we pointed out that if respondent wished to avail himself of any such facts they should be set up by way of answer to the libel. We do not deny, however, that a suit at common law has been brought by respondent against your petitioner.

The Circuit Court of Appeals does *not* hold that your petitioner cannot invoke limitation of liability under R. S. sec. 4283 because a common law suit is pending but holds that because respondent is predicating his suit against your petitioner upon negligence in the manufacture and building of the vessel, therefore, liability cannot be limited under the statute (R. 36).

The libel shows (R. 10) and the facts stated in the opinion of the Court of Appeals show (R. 31) that the damage claimed to have resulted to respondent's person and property was by reason of an explosion occurring on the boat

while it was being operated upon the waters of Lake Michigan.

The jurisdiction of admiralty to entertain the libel is determined by the place where the injury was sustained, regardless of where the negligent act, if any, which resulted in the explosion may have been done; *The Plymouth*, 3 Wall 20, 36; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469, 476; *Rundell* v. *La Campagnie*, 100 F. 655, 657 (C. C. A. 7th); *Hermann* v. *Mill Co.*, 69 Fed. 646, 651; *Burke* v. *Southern Bell Telephone Co.*, 42 F. (2d) 742, 743.

Respondent's suit at law against your petitioner is not for breach of contract but in tort alleging negligence in construction, equipment and inspection of the vessel (so stated by the Court below in its opinion, R. 32, 36). The negligence asserted does not change the *maritime* nature of the *liability*, if any, of your petitioner.

5. The court below erred in holding that the only liability which the statute limits is an imputed liability which arises from or grows out of ownership (R. 34, 36).

The statute (R. S. sec. 4283) does not create liability. It limits liability. *Any* liability for a tort occurring on the navigable waters of the United States may be limited, unless done, occasioned or incurred with the privity or knowledge of the owner.

If the owner be a corporation the privity or knowledge of a mere employee will not be imputed to the corporation and liability, if any, may be limited, *Craig* v. *Continental Insurance Co.*, 141 U. S. 638; *Earle & Stoddart* v. *Ellerman's Wilson Line*, 53 Sup. Ct. Rep. 200. In that sense imputed liability can be limited.

It does not follow that the only liability which may be limited is an imputed liability which grows out of ownership. Admiralty would have jurisdiction of a libel against your petitioner by respondent for the damage claimed (see authorities cited under Point 4, supra). If so, petitioner, as owner, may invoke limitation of liability under the statute, whether the theory of respondent's claim be against your petitioner because of ownership, or because of delivering to respondent, as conditional vendee of petitioner, a vessel negligently constructed.

6. Even though liability could not be limited, the court below erred in dismissing the libel.

The libel not only alleges that respondent is claiming damages to his person and property as a result of the explosion and fire (R. 10), but that two other persons were with respondent on the cruiser at the time of the accident and that your petitioner is informed and believes that these persons, and other persons or corporations who are insurer of the cruiser and property on board, all make or may hereafter make claim for damages against your petitioner (R. 10-11). The libel prayed for complete relief (R. 13-14).

Even though the Circuit Court of Appeals was of the opinion liability could not be limited, it should have reversed the case with directions to the District Court to proceed to adjudicate all claims coming from the accident. *Hartford Accident Co.* v. *Southern Pacific*, 273 U. S. 207.

CONCLUSION.

We respectfully submit that the libel states facts sufficient to invoke the limitation of liability statute, and the decision of the court below should be reviewed by This Court in order that the uniformity of admiralty law may be preserved.

Respectfully submitted,

CHARLES J. HARDY,
NOAH A. STANCLIFFE,
JOHN R. COCHRAN,
Proctors for Petitioner.

LEONARD F. MARTIN,
PAUL R. CONAGHAN,
Of Counsel.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 623

AMERICAN CAR AND FOUNDRY COMPANY,
A CORPORATION,
Petitioner,

vs.

H. A. BRASSERT,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

WILLIAM HOWARD,
ROY O. WEST,
PERCY B. ECKHART,
LEWIS C. JESSEPH,
Proctors for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. .....

AMERICAN CAR AND FOUNDRY COMPANY, A CORPORATION,

Petitioner.

vs.

H. A. BRASSERT,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The opinion rendered in this case by the United States Circuit Court of Appeals for the Seventh Circuit is reported in 61 Fed. (2d) 162. We do not question the jurisdiction of this Court.

We believe, however, there are certain facts which should have further attention. They are:

1. The Conditional Sales Agreement provides that "Purchaser shall have and be entitled to the possession and use of the boat from its delivery hereunder, but only upon and subject to all the conditions hereof" (R. 6).

2. Paragraph 8 of the Agreement provides that the right to the possession and use of the boat may be forfeited if the purchaser shall default in the payment of the notes given to evidence the remainder of the purchase price; if a receiver is appointed to take possession of the purchaser's property or a petition in bankruptcy is filed by or against him or he makes a general assignment for the benefit of creditors; if the purchaser shall default in the performance of any of the provisions of the contract, and, *if the seller shall deem the security for the* payment of said notes *intended* to be afforded hereby insufficient or unsafe (R. 7, 8).

It is alleged in the libel and admitted by filing the exceptions thereto that on August 18, 1930, the date upon which the boat was destroyed by explosion and fire, the Conditional Sales Contract was in "full force and effect" (R. 9).

3. It is further provided by the agreement that "4. Purchaser shall at all times and at Purchaser's own expense, keep the boat insured with full marine coverage *including protection and indemnity* (with loss, if any, payable to the Seller as its interest may appear) in a company or companies approved by Seller. The insurance coverage against loss or damage by fire shall be in an amount not less than the full amount of the *notes issued hereunder outstanding and unpaid.* The insurance policies, or duplicates of them, shall be delivered to and remain with the Seller" (R. 6).

"5. * * * Purchaser shall comply with all the laws of the United States affecting the boat and of all the States and territories in which the boat may be operated, and with all lawful acts, rules, regulations and directions of any authority exercising any power, regulation or supervision over the boat. *Purchaser shall in-*

demnify, protect and hold harmless Seller from and against any and all liability, claim, demand, cost, charge and expense in any way imposed upon or accruing to Seller arising out of or in connection with the use and/or operation of the boat" (R. 6).

4. It is admitted that petitioner, at the time of the transaction in question, was "engaged in the manufacture and sale of gasoline-propelled yachts and cruisers; and that on August 18, 1930, the boat it sold to Respondent was destroyed by explosion and fire while being operated by him on Lake Michigan, navigable water of the United States" (R. 2, 10).

The Exceptions contain among others the following specifications:

> "The Respondent, H. A. Brassert, hereby excepts to the libel herein in the following respects:
>
> "1. That it does not disclose that the Libelant was the owner of the motor boat 'Orion' at the time of its destruction by explosion and fire, as therein alleged.
>
> "2. That it does not disclose that the Libelant was the owner of said motor boat 'Orion' in such manner and to such extent as to warrant the maintenance of a proceeding to limit the liability of shipowners.
>
> "3. That it does not disclose that at the time of its destruction by explosion and fire, as therein alleged, or at any time prior thereto, said motor boat 'Orion' was engaged or was being used by Libelant in maritime commerce upon the high seas and/or upon the navigable waters of the United States.
>
> "4. That it does not disclose that at the time of its destruction by explosion and fire, as therein alleged, or at any time prior thereto, the said motor boat 'Orion' was engaged or was being used by Libelant in the transportation of passengers and/or freight for hire upon the high seas and/or upon the navigable waters of the United States.

"5. That it does not disclose that at the time of the destruction of the motor boat 'Orion' by explosion and fire, as therein alleged, Libelant was a 'ship-owner' within the meaning of that term as used in Sections 183 to 189, inclusive, U. S. C. A., Chapter 8, Title 46, or any other acts or statutes of the United States limiting the liability of 'ship-owners.'

"6. That it does not disclose that at the time of the destruction of said motor boat 'Orion' by explosion and fire, as therein alleged, or at any other time, Libelant was engaged in the business of building and operating ships or boats of any kind in maritime commerce upon the high seas and/or upon the navigable waters of the United States.

"7. That it does not disclose that at the time of the destruction of said motor boat 'Orion' by explosion and fire, as therein alleged, or at any other time, Libelant was engaged in the business of shipping upon the high seas and/or upon the navigable waters of the United States.

"12. That it does not disclose that the contract set forth in Paragraph 4 thereof is not personal, creating a personal liability on Libelant and therefore is not within the statutes of the United States limiting the liability of ship-owners.

"13. That it does not disclose facts sufficient to justify limiting the liability of Libelant * * *" (R. 16-17).

The case involves three questions, all of which were decided for respondent by the Circuit Court of Appeals. They are:

1. Petitioner was not the "owner" of the boat within the meaning of the United States Statute limiting the liability of "ship-owners."

2. The statute limiting the liability of "ship-owners" does not apply to one engaged solely in the manufacture of gasoline-propelled yachts and cruisers or other vessels.

3. Since the motor boat was not manned and operated by a master and crew of petitioner, there is no liability that can be limited.

We shall contend that these questions were correctly decided; that they were decided in conformity with the decisions of this Court, and that the petition for writ of certiorari should be denied.

III.

AT THE TIME OF ITS DESTRUCTION, THE MOTOR BOAT WAS NOT MANNED AND OPERATED BY A MASTER AND CREW OF PETITIONER. THERE IS NO LIABILITY, THEREFORE, THAT CAN BE LIMITED. THE LIBEL DOES NOT STATE A CAUSE OF ACTION.

The only liability which can be limited under the statute is the imputed liability of the ship-owner. The liability of the owner for his own fault, neglect and contracts is not affected by the statute. But the motor boat was not in charge of petitioner's agents and servants when it was destroyed. There is, therefore, no imputed liability to limit.

ARGUMENT.

I.

AT THE TIME THE MOTOR BOAT WAS DESTROYED, PETITIONER WAS NOT ITS OWNER WITHIN THE MEANING OF THE WORD "OWNER" AS USED IN SECTION 183, TITLE 46, U. S. C. A., AND OTHER UNITED STATES STATUTES LIMITING THE LIABILITY OF SHIP-OWNERS.

"A" We are here concerned with the meaning of the word "owner" as used in Section 183, Title 46, U. S. C. A., which provides:

> "The liability of the *owner* of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such *owner or owners*, shall in no case exceed the amount or value of the interest of such *owner* in such vessel, and her freight then pending."

In 22 R. C. L. 75, it is said:

> "The meaning of the term 'owner' is varied and depends in a great measure on the manner of its use. When used alone it imports an absolute owner or one who has *complete dominion* of the property owned, as the owner in fee of real property. The term is undoubtedly broad enough to cover a tenant for years, a tenant for life, and a remainderman in fee. So there may be a legal and an equitable estate; the trustee and the *cestui que trust* are both owners. The term when used without restriction includes both general and special owner. *Both in common parlance and in legal acceptation, he is the owner of property who, in case of its destruction, must sustain the loss of it.* Therefore a person is

> the 'owner' of property although he holds the equitable title only. *Thus one who is in possession of land, under a contract for the conveyance of the fee on the payment of the purchase money, is the equitable owner in fee, and he is the entire unconditional and sole owner within the meaning of insurance policies requiring such an ownership.*"

In 50 C. J. 771, we find that "the term 'owner' has a variety of meanings, and is a versatile term, to suit the circumstances in which it is used; it varies in its significance according to the context and subject matter, that is, the meaning of the term is to be gathered from the connection in which it is used, and from the subject matter to which it is applied."

"B" It may include an equitable as well as a legal ownership. In *Schott* v. *Harvey,* 105 Pa. St. 222, 51 Am. Rep. 201, the Supreme Court of Pennsylvania had occasion to define the word "owner" used in a statute of that State requiring the "owners, superintendents or managers" of factories to provide fire escapes. The precise question was, whether the landlord or the tenant was the "owner." In deciding the question, the Court said at pp. 228-229 of the official report, p. 204, 51 Am. Rep.:

> "A number of authorities were cited showing the construction which has been placed upon the word 'owner' both by the legislature and the courts. But the meaning of the word depends in a great measure upon the subject matter to which it is applied, and as it is used in each of the instances cited in an entirely different connection, they throw scarcely a glimmering of light upon the question. The term 'owner' is undoubtedly broad enough to cover either view of the case. A tenant for years, a tenant for life, and a remainderman in fee is each an owner. So there may be a legal and an equitable estate; the trustee and the *cestui que trust* are both owners. When therefore the legislature used a term of such varied meaning, we must presume they intended such

an owner as is *in the possession and occupancy of the premises, who has the immediate dominion and control over it, and the manner of whose use of it makes a fire-escape necessary.* Had the owner in fee been intended it was easy to have said so. This view meets all the requirements of the Act. It places the responsibility where it properly belongs, upon the person in the possession and occupancy of the property as owner for the time being, and the nature of whose business renders the erection of fire-escapes necessary to protect the lives of his employees."

In *Green* v. *Root,* 62 Fed. 191, the United States District Court for the Southern District of Iowa, Eastern Division in construing the word "owner" as used in the homestead statutes of that State, said at page 196 that "the term 'owner,' as applied to homestead, in said section, by the Iowa supreme court, includes one who, as tenant in common, *has merely an equitable title in the land,* one who has merely a term of years leasehold interest in the land, and also one who has merely the *right to obtain the title by paying off the deferred purchase money.*"

"C" In *Warren* v. *Salt Creek Drainage District,* 316 Ill. 345, the Supreme Court of Illinois, in defining the term "landowner" as used in the Levee Act, said at p. 347:

> "The word 'owner' is *nomen generalissimum,* and its meaning is to be gathered from the connection in which it is used and from the subject matter to which it is applied, *and when used in a statute the obvious nature and purpose of the statute may indicate its meaning.*"

"D" The term "owner" implies more than *a bare legal title.*

In *Hyde* v. *Shine,* 199 U. S. 62, this Court was considering the meaning of the word "owner" as found in the

Act of June 4, 1897, providing that where a tract of land is included within a public forest reservation, the *settler* or *owner* thereof may relinquish the tract to the Government. In discussing that question, the Court said at p. 82:

> "Although the word owner has a variety of meanings and may, under certain circumstances, include an equitable as well as a legal ownership, or even a right of present use and possession, *it implies something more than a bare legal title*, and we know of no authority for saying that a person in possession of land under a void deed can be regarded as the owner thereof. Ownership may not imply a perfect title, but it implies something more than the possession of land under a title which is void; and when the Government holds out to owners of land an inducement to relinquish such lands in exchange for others, it implies that the persons with whom it is dealing, if not the owners in fee simple, are at least bona fide owners, with authority to dispose of and vest a good title thereto."

This language is significant when viewed in the light of the facts of this case. Here, petitioner agreed to sell and respondent agreed to buy the motor boat. Seven Thousand Dollars ($7,000), or one-half the purchase price was paid at the time the boat was delivered to respondent. The Conditional Sales Agreement specifically declared "Purchaser shall be entitled to the possession and use of the boat so long as Purchaser shall observe the conditions and obligations hereof * * *" (R. 6).

By these provisions of the agreement, the beneficial ownership of the motor boat was vested in respondent. The *"bare legal title"*, however, was reserved in the petitioner for the purpose of security only. This clearly appears from that clause in the agreement providing "if the Seller shall deem the security for the payment of the said note intended to be afforded hereby insufficient and unsafe, then, in such case, or either of such cases,

the Seller shall be entitled to and may at its option retake the boat, the equipment thereof and the accessories thereto, retaining all payments which up to said time shall have been made on account thereof (which amount it is hereby expressly agreed, constitutes no more than the reasonable value of the use of the boat)" (R. 8).

The "bare legal title" alone was retained as "security for the payment of the notes" (in this case one note only) given to evidence the balance of the purchase price of the boat.

"E" Coming nearer to the meaning of the term "owner" as used in Section 183, Title 46, U. S. C. A., we find that a mortgagee of a vessel out of possession is not liable for repairs as an owner. In 24 R. C. L. 1086 it is said:

> *"As with other chattel mortgages, it is very generally held that the mortgage of a ship vests in the mortgagee a present legal title defeasible on condition. * * * In the absence of an express agreement to the contrary, a mortgagee not in possession of the vessel is not entitled to the earnings as an incident of his mortgage, nor liable for repairs and necessaries ordered by the mortgagor, or for the discharge of any other duties and obligations incident to vessel ownership, even though the vessel be registered in his name. These rights and liabilities rest on the mortgagor until the mortgagee takes possession and thereby succeeds to them."*

Morgan's Assignees v. *Shinn*, 15 Wall. 105, was an appeal from the Supreme Court of the District of Columbia. The assignees of Morgan, Rhinehart & Co. filed a bill in the lower court against Shinn to enforce contribution for the payment of advances made by their assignors for repairs and expenses of a steamer called the Fairfax. The bill averred that Shinn was owner of a one-fourth interest in the vessel. Shinn by his answer denied the averment of ownership and alleged an inter-

est only as mortgagee. After finding that a bill of sale by one of the co-owners to Shinn was intended as security only, and although "absolute in its terms," was a mortgage, the Court said at p. 110:

> *"If then Shinn was only a mortgagee of an undivided interest in the vessel,* as we think he was, he is under no obligation to contribute for repairs which he did not order. A mortgagee out of possession is not liable for repairs. The benefit of repairs enures primarily to the mortgagor. *A mortgagee out of possession does not appoint the master or the ship's agents. They do not act under authority from him, and he is not entitled to the freight earned. Nor does it make any difference though the vessel be registered in his name."*

We find no authority to the contrary. If a mortgagee out of possession is not liable for repairs as an owner, we submit he would not be liable for the loss of freight or passengers as an owners under the statute in question.

"F." Vendors of a vessel under a conditional sales agreement are not liable as owners for loss of freight, or for repairs or supplies furnished to the vessel.

In 24 R. C. L. 1195, it is said:

> "As in the case of other obligations incident to vessel ownership, liability for supplies, repairs and advances attaches to the owner *pro hac vice*, whether he is the general owner or not. A person may, however, be the legal owner of a vessel, and have her registered or enrolled in his name, without being liable for supplies furnished for her use on the order of the master, as where he holds merely the legal title, without management or control, whether the title is by a bill of sale or other sufficient conveyance, or whether it is by mortgage or other document in the nature of a pledge or security. *No liability for such supplies rests upon a person holding legal title to a vessel as security for a debt, and exercising no control over the vessel and having no interest in the*

profits other than as a repayment of advances, as, for example, a vendor who has parted with both possession and control of the vessel, and only retains the title for the purpose of securing future payments of the purchase money, or who has taken a mortgage upon her, without holding himself out to the world as continuing in ownership.''

Jones v. *Pitcher,* 3 Stewart & Porter (Ala.) 135, 168; 24 Am. Dec. 716, 734, was an action in assumpsit by Pitcher & Co. against Jones and others as joint owners of the steamboat Warrior, to recover the value of sixty-nine bales of cotton shipped by Pitcher & Co. on board the Warrior from Tuskaloosa to the port of Mobile. It was alleged that the loss was caused by the negligence of the master of the boat. At the trial defendants, Sims & Scott, offered in evidence a contract between themselves and Hammond & Donaldson, for the sale of the interest of the former in the boat. The agreement was in the nature of a penal bond, whereby Sims & Scott bound themselves for a sale of all their interest in the Warrior. In consideration for this interest, Hammond & Donaldson agreed to pay the sum of Three Thousand Five Hundred Dollars, to be discharged in freight and to insure the steamboat for the sum of Five Thousand Dollars and to deliver the policy to Sims & Scott as further security.

The court instructed the jury that this contract was a transfer of the right of Sims & Scott to Hammond & Donaldson, and discharged the former from all liability for losses subsequently occasioned by the boat ''unless the contract was fraudulent, or unless Sims & Scott had subsequently received a portion of the earnings of the boat, or had participated in the appointment of a master, or had done other acts evincive of ownership.'' (See 3 Stewart & Porter, 138, 139.) After reviewing the authorities, it was held that ''An agreement, bona fide, for the sale of an interest in a steamboat, between

part owners thereof, and a stranger, whereby the former were to execute title, when the purchase money should be paid; to hold the policy of insurance as collateral insurance; and to receive the consideration money, in freight; held not to continue the liability of the vendors, so as to render them responsible for the liabilities fixed upon the boat, after the execution of the contract; it appearing that the interest in the boat had passed into the possession and use of the vendees."

Thorn v. *Hicks*, 7 Cowen (N. Y.) 696, was an action in case against the owners of a sloop for certain bales of pressed hay shipped on board the sloop from Hudson to New York, but which were destroyed by fire. The question at the trial was whether the defendant was the owner of the sloop. The facts were, that on the 10th of January, 1821, Jacob Acker being owner of the sloop, she was then sold on a fi. fa. against him, in favor of the defendant, with one Waring and others. Waring purchased for the plaintiffs in the execution; and he testified that afterwards, and before the hay was put on board, he, on his own behalf, and as trustee of the other owners, sold the sloop to Acker, the former owner, on these terms: Acker to take possession and employ the sloop in the freighting business; to pay the several persons interested in the sale their respective portions of the price as fast as he could earn the money with the sloop, and that when they were thus paid the legal title was to be transferred to Acker. In the meantime, the legal title was to remain in the vendors. Acker immediately took possession and carried on the freighting business until the destruction of the hay. This the plaintiff knew when the hay was shipped and that Acker carried on the business upon his own account and they spoke of setting off a note against Acker, purchased by them below par, in payment for the freight. The judge

charged that the defendant was liable, as long as he held the title to the sloop or any part of her, or had an interest in her earnings, so far as they should go to enable Acker to pay for her. The jury returned a verdict for the plaintiffs. In disposing of the case, the Court said at p. 697:

> *"The mere circumstance of the naked legal title to the vessel remaining in Hicks and his associates, to secure the purchase money for which she had been sold, unquestionably would not render them liable as owners, on the contracts of the master, or for the consequences of his negligence and unskilfulness."*

And further, at p. 698, it is said:

> "These cases (*Wendover* v. *Hogeboom*, 7 John. 308, and *Leonard* v. *Huntington*, 15 John. 298) settle two points: 1. That the ownership of a vessel is not determined by the register; (vid. also 14 John. 201;) 2. That a regular bill of sale is not essential to transfer the property in a vessel, so as to exempt the former owners from responsibility for articles furnished to her; but that where the contract for the sale is made, and the vessel delivered to the purchaser, the responsibility of the vendor ceases as owner, although, by the express terms of the contract, he retain the legal title in himself, for the purpose of securing the consideration money, until it is paid."

It was held that the charge of the trial judge was erroneous and a new trial was granted.

These cases were decided before the Limited Liability Statutes were passed by Congress. They do not construe Section 183, Title 46, U. S. C. A. They do indicate very clearly, however, who was the "owner" of the vessel and the persons for whose benefit these statutes were passed by the Congress. In other words, those persons are "owners" upon whom liabilities rest which can be limited under the statutes in question. In the absence of liability which can be limited under these statutes, no

person is an "owner." Unless it can be found in this case that a liability which can be limited rests upon petitioner, it must be held that it was not the owner of the motor boat at the time of its destruction.

"G." We have found no authority which decides who is the "owner" of a vessel within the meaning of Section 183, Title 46, U. S. C. A., under the facts of this case. In the following cases, however, it is held that persons were "owners" within Section 183, under the facts therein.

Craig v. *Continental Insurance Co.*, 141 U. S. 638, was an action at law by Craig, as administrator of the estate of John Carbry, deceased, against the Continental Insurance Company of New York and three other insurance corporations, to recover under the Michigan statute $25,000 as damages for the death of Carbry, for the benefit of his mother and his three minor sisters, as next of kin and distributees of his estate, it being alleged that he lost his life through the negligence of the defendants in December, 1883. The action was commenced in the Superior Court of the City of Detroit, Michigan, and was removed by the defendants to the Circuit Court of the United States for the Eastern District of Michigan. The facts were, that the defendants were insurers against marine risks of a steam propeller called the Enterprise. While on a voyage on the Lakes, she was stranded November 20, 1883, on rocks at Green Island in the northern part of Lake Huron. She had on board at the time a cargo of merchandise and a crew of 10 or 12 men. After stranding, her owners abandoned her to the insurers and she became the property of the latter. Crosby & Dimock of Buffalo were general agents for the Continental Insurance Company and some other companies and had in their employ James J. Reardon, a marine in-

spector. It was his duty, when notified, to go to the assistance of wrecks and stranded vessels insured by companies represented by Crosby & Dimock and get them to a port of safety. On November 29, 1883, Reardon was notified by Crosby & Dimock in regard to the Enterprise, and went with a steam-tug called the Balize, with steam-pumps and engineers, to her assistance. One of the steam-pumps was in charge of Carbry. Soon after reaching the Enterprise, her crew being still on board and in charge of her, the steam-pumps were set up, she was pumped out and pulled from the place where she had stranded. This was done under the supervision of Reardon. She was more or less injured by the stranding; but when she was off she was towed into deep water, and, although she leaked, she was kept free by the use of one pump for about 66 hours. That was from 10 o'clock Thursday morning until 4 o'clock the following Sunday morning. Part of her cargo had been removed, but it was replaced. Her machinery was disabled, and it was necessary that the Balize should take her in tow to remove her to a port where she could be repaired. She started in tow astern of the Balize, bound for Detroit, at 4 o'clock on Sunday morning, December 9, 1883, with her cargo on board and a crew of 13 men, including 4 who were in charge of two steam-pumps, one of which was under the care of Carbry. Her mate was in command. Reardon was on board the Balize. No trouble was experienced in the navigation of the Enterprise until 2 o'clock on the morning of the next day, 22 hours after she had started, and then, while off Point aux Barques and Saginaw Bay, she filled and sank, became a total loss, and Carbry lost his life. The declaration alleged that his life was lost through the negligence of the defendants.

At the trial three of the defendant companies, other

than the Continental Insurance Company, were dismissed from the action and a verdict was rendered by a jury against that Company for the sum of $8,000. On motion, a new trial was granted the Continental Insurance Company on the ground that the liability, if any, was defeated under the provisions of Section 4283 of the Revised Statutes of the United States (Section 183, Chapter 46, U. S. C. A.) Upon a re-trial, the Court instructed the jury to render a verdict in favor of the defendant, which was done. The plaintiff excepted to the instruction of the Court in this respect. The case was then taken to this court by writ of error. It was stated in the bill of exceptions that prior to the sending of the expedition under Reardon to rescue the Enterprise, she had been abandoned by her owners to the Continental Insurance Company by which she was insured, and had become its property and that, by reason of her being sunk at the time Carbry lost his life, she became and was a total loss. In disposing of the case this court held that "The provisions of Section 4283 of the Revised Statutes relieving the owner of a vessel from liability for a loss occasioned without his privity or knowledge, apply to an insurance company, to which, as insurer, a vessel has been abandoned, and which was charged with negligence in causing the vessel to be so towed that she sank and became a total loss, and the life of an employee on board her was lost."

In this case the death of Carbry occurred while the vessel was in possession of the insurance company which had become her "owner." The property in the vessel had passed to the insurance company by abandonment by her former owners. If any liability attached under these facts, it was the liability of the insurance company, the "owner," and such liability could be limited under the

statutes in question. Here we have a liability which could be limited, if found to exist.

Flink v. *Paladini*, 279 U. S. 59, was a certiorari to a decree of the Circuit Court of Appeals for the Ninth Circuit, reversing an order of the district court in a proceeding to limit liability for personal injuries suffered by petitioner while serving aboard ship at sea. The reversed order refused a stay of actions in State and Federal courts, which the petitioner had brought against the respondents to enforce their liability under the State law (California) as stockholders of the corporation owning the ship. Petitioner sued the corporation and its stockholders, the respondents, under the Constitution and Civil Code of California which provided that "each stockholder shall be individually and personally liable for such proportion of all its debts and liabilities contracted during the time he was a stockholder, as the amount of stock owned by him bears to the whole of the subscribed capital stock" (279 U. S. 62). It was contended the stockholders were not "owners" within the meaning of that word as used in Section 183, Title 46, U. S. C. A., but this court held otherwise. At page 62 of the opinion it is said:

> "The purpose of the act of Congress was 'to encourage investment by exempting the investor from loss in excess of the fund he is willing to invest in the enterprise.' 26 F. (2d) 24. *Richardson* v. *Harmon*, 222 U. S. 96, 103. *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 214. For this purpose no rational distinction can be taken between several persons owning shares in a vessel directly and making the same division by putting the title in a corporation and distributing the corporate stock. The policy of the statutes must extend equally to both. In common speech the stockholders would be called owners, recognizing that their pecuniary interest did not differ substantially

> from those who held shares in the ship. We are of opinion that the words of the acts must be taken in a broad and popular sense in order not to defeat the manifest intent."

In the Paladini case, the stockholders were made liable for the debts of the corporation by the law of California, and they were simply attempting to limit their own liability. But the interesting phase of the holding is, that being liable as stockholders they were allowed to limit their liability as owners. This brings us back to our previous statement that an "owner" within the meaning of the statute is one upon whom rests a liability which can be limited by resort to the statutes enacted for that purpose.

In the *Paladini case* (279 U. S. 59), the stockholders, acting through their corporation, purchased a vessel. In the instant case appellant had sold the vessel, the motor boat. In fact, appellant had parted with its investment in the motor boat by transferring it to another. It had parted with the possession, use and enjoyment of the property. Dominion over the property was in another, and to make doubly sure that its liability should cease, it provided in the Conditional Sales Agreement that "Purchaser shall indemnify, protect and hold harmless seller from and against any and all liability, claim, demand, cost, charge, and expense in any way imposed upon or accruing to seller arising out of or in connection with the use and/or operation of the boat" (R. 6).

Furthermore, in the Conditional Sales Agreement it is provided "Purchaser shall at all times, and at purchaser's own expense, keep the boat insured with full *marine coverage*, including protection and indemnity, (*with loss, if any, payable to seller as its interest may appear*) in a company or companies approved by seller. *The insurance coverage against loss or damage by fire*

shall be in an amount not less than the full amount of the notes issued hereunder outstanding and unpaid. The insurance policies, or duplicates of them, shall be delivered to and remain with seller" (R. 6).

It is alleged in Paragraph 5 of the libel, page 9 of the record "that on the 18th day of August, 1930, said agreement was in full force and effect and that there was due and owing said American Car and Foundry Company, as owner, from said H. A. Brassert, the sum of Seven Thousand Thirty-nine Dollars and Three Cents ($7,039.03), as set forth in said agreement and as evidenced by a promissory note for said amount, dated June 20, 1930, signed by said H. A. Brassert, as maker, and payable to said A. C. F. Co. 90 days after date."

August 18, 1930, was the day the boat was destroyed by explosion and fire. On that day respondent owed petitioner the balance of the purchase price, and he was therefore the owner of the boat. If the Conditional Sales Agreement was in full force and effect on that date, then the boat was insured as provided by the terms of the contract, and the insurance was payable to petitioner as its interest might appear. Its interest was one of Seven Thousand Thirty-nine Dollars and Three Cents ($7,039.03). It had parted with the boat and was interested only in securing the purchase price. In truth, its position was the same as it would have been had it sold the boat and taken back a chattel mortgage to secure the balance of the purchase price. The purchase price of the motor boat was the property of petitioner. The motor boat was the property of respondent. He was the "owner" therefore within the meaning of that word as used in Section 183, Title 46, U. S. C. A. and kindred statutes limiting the liability of a shipowner.

While the words of the Act should be "taken in a

broad and popular sense," they should not be taken in so broad and popular a sense as to include those who were in no wise within the contemplation of the law, and who, we shall hereinafter contend, have no liability which can be limited under the statutes in question.

II.

THE UNITED STATES STATUTES LIMITING THE LIABILITY OF "OWNERS" DO NOT APPLY TO ONE ENGAGED SOLELY IN THE MANUFACTURE OF GASOLINE-PROPELLED YACHTS AND CRUISERS OR OTHER VESSELS.

A. It is alleged in Paragraph 1 of the libel (R. 2) that American Car & Foundry Company "during several years last past was, and now is, engaged in the manufacture and sale of gasoline-propelled yachts and cruisers * * *." This is the only allegation in the record with reference to the petitioner's business. It is nowhere alleged that petitioner was at any time engaged in the business of navigating ships or vessels upon the high seas or the navigable waters of the United States, or in any other business maritime in nature.

The libel was excepted to as being insufficient upon the grounds, among others, "that it does not disclose that at the time of its destruction by explosion and fire, as therein alleged, or at any time prior thereto, said motor boat 'Orion' was engaged or was being used by libelant in maritime commerce upon the high seas and/or upon the navigable waters of the United States. That it does not disclose that at the time of its destruction by explosion and fire, as therein alleged, or at any time prior thereto, the said motor boat 'Orion' was engaged or was being used by libelant in the transportation of passengers and/or freight for hire upon the high seas and/or

upon the navigable waters of the United States. That it does not disclose that at the time of the destruction of the said motor boat 'Orion' by explosion and fire, as therein alleged, or at any other time, libelant was engaged in the business of building and operating ships or boats of any kind in maritime commerce upon the high seas and/or upon the navigable waters of the United States. That it does not disclose that at the time of the destruction of the said motor boat 'Orion' by explosion and fire, as therein alleged, or at any other time libelant was engaged in the business of shipping upon the high seas and/or upon the navigable waters of the United States. That it does not disclose facts sufficient to justify limiting the liability of libelant. That it does not disclose that a court of admiralty has jurisdiction of the subject matter of this proceeding'' (R. 16, 17).

This question therefore arises, can a manufacturer of "gasoline-propelled yachts and cruisers'' limit liability under the statutes passed for that purpose? We contend that it cannot. It has been held repeatedly that the purpose of the statutes limiting the liability of ship-owners was to promote shipping or maritime commerce. In 24 R. C. L. 1389-1390, it is said:

> "*The statutes limiting vessel owners' liabilities were passed by Congress for the purpose of encouraging the investment of capital in the building and navigation of ships, by enabling the owners of American ships to compete upon equal terms of liability with foreign shipowners.* Being declaratory of the rule deemed by the lawmaking power to be most just and expedient in maritime cases, these statutes should be administered by the courts in a spirit of fairness, with a view of giving to shipowners the full benefit of the immunities intended to be secured by them, and carrying out the policy they were intended to promote. The several enactments are to be regarded as regulations in pari materia, and should be construed as parts of an entire scheme.

It is none the less true, however, that these acts are in derogation of the common law; and the courts should not construe them to abridge the rights of injured parties to a greater extent than the language used will fairly warrant, or to limit the right to a recovery beyond what is necessary to effectuate the purpose of Congress.''

In The ''Scotland'', 105 U. S. 24, it is said at pp. 30-31:

''This statute (Section 183) declares the rule which the law-making power of this country regards as most just to be applied in *maritime cases.* The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employes, but risk only the amount of their capital stock in the corporation. The doctrine of respondeat superior, it is true, applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As Grotius says, in reference to this very matter of ship-owners, 'Men would be deterred from *owning and operating ships,* if they were subject to the fear of an indefinite liability for the *acts of the master.*' ''

In *Providence Etc. S. S. Co.* v. *Hill Mfgr. Co.*, 109 U. S. 578, speaking of the statutes limiting the liability of ship-owners, the Court said at p. 588:

''In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the *shipping interest,* the value and importance of which to our *maritime commerce* can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of *fairness,* with the view of giving to *ship owners* the full benefit of the immunities intended to be secured by it, the encouragement it will afford to *commercial*

operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the *ship owner,* and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

In *The Main* v. *Williams,* 152 U. S. 122, it is said at p. 128:

"The earliest American legislation upon this subject (limited liability of shipowners) is found in a statute of Massachusetts passed in 1818, and revised in 1836. This was taken substantially from the statute of George II. It was followed by an act of the legislature of Maine in 1831, copied from the statute of Massachusetts.

The attention of Congress does not seem to have been called to the necessity for similar legislation until 1848, when the case of The Lexington, reported under the name of the *New Jersey Steam Navigation Co.* v. *Merchants' Bank,* 6 How. 344, was decided by this court. In this case the owners of a steamboat, which was burnt on Long Island Sound were held liable for about $18,000 in coin, which had been shipped upon the steamer and lost. *In consequence of the uneasiness produced among ship owners by this decision, and for the purpose of putting American shipping upon an equality with that of other maritime nations, Congress, in* 1851, *enacted what is commonly known as the Limited Liability Act, which has been incorporated into the Revised Statutes, sections* 4282 *to* 4290, *and amended in certain particulars not material to this case, in two subsequent acts.*"

And further, at p. 132, it is said:

"The English courts have held, very properly we think, that these statutes should be strictly construed. As observed by Abbott, C. J., in *Gale* v. *Laurie,* 5 B. & C. 156, 164: 'Their effect, however, is to take away or abridge the right of recovering dam-

ages, enjoyed by the subjects of this country at the common law, and there is nothing to require a construction more favorable to the ship owner than the plain meaning of the word imports.' To the same effect are the remarks of Sir Robert Phillimore in The Andalusian, 3 P. D. 182, 190, and in The Northumbria, L. R. 3 Ad. & Ec. 6, 13. Speaking of this statute, Lord Justice Brett, in *Chapman* v. *Royal Netherlands Nav. Co.*, 4 P. D. 157, 184, remarked: 'A statute for the purposes of public policy, derogating to the extent of injustice, from the legal rights of individual parties, should be so construed as to do the least possible injustice. This statute, whenever applied, must derogate from the direct right of the ship owner against the other ship owner * * *. It should be so construed as to derogate as little as is possible consistently with its phraseology, from the otherwise legal rights of the parties.'

While, from the universal habit of insuring vessels, the application of the statute probably results but rarely in an actual injustice to the owner of the injured vessel, yet, being in derogation of the common law, we think the court should not limit the right of the injured party to a recovery beyond what is necessary to effectuate the purposes of Congress."

In *Evansville Etc. Co.* v. *Chero Cola Bottling Co.*, 271 U. S. 19, the Court, in holding that a wharfboat in a river, used as an office, warehouse, and wharf, but not used or capable of use as a means of *transportation*, was not a "vessel" within the Limited Liability Act, said at pp. 21-22:

"The rule of limited liability of owners of vessels is an ancient one. It has been administered in the courts of admiralty in Europe from time immemorial and by statute applied in England for nearly two centuries. See *Providence & New York S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 593; *The Main* v. *Williams*, 152 U. S. 122, 127. Our statutes establishing the rule were enacted *to promote the building of ships, to encourage the business of navigation*, and in that respect to put this country on the same footing with other countries. See *Moore* v.

American Transportation Co., 24 How. 1, 39; *Norwich Company* v. *Wright*, 13 Wall. 104, 121. *The rule should be applied having regard to the purposes it is intended to subserve and the reasons on which it rests.*

The only question presented is whether appellant's wharfboat was a 'vessel' at the time it sank. It was an aid to river traffic, but it was not used to *carry freight from one place to another. It was not practically capable of being used as a means of transportation.* It served at Evansville as an office, warehouse and wharf, and was not taken from place to place. The connections with the water, electric light and telephone systems of the city evidence a permanent location. *It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed. There appears to be no reason for the application of the rule of limited liability.*"

These cases all deal with the statutes under consideration. The statutes were passed to promote the building and navigation of ships in maritime commerce. The risk or hazard incident to transportation by water was that with reference to which liability could be limited under the statutes. They deal with the "*perils of navigation.*"

It is needless to say there is no "*peril of navigation*" in the business of manufacturing ships only. The peril attaches when the owner engages in navigation, or in the transportation of goods and passengers in maritime commerce.

"B." Furthermore, a contract to build a vessel is not a maritime contract. In 1 R. C. L. 420, it is said:

> "*That contracts for the building of vessels or ships, or for labor performed or materials furnished in their construction, are not maritime contracts, and not cognizable in admiralty, is affirmed by the whole current of judicial authority.*"

All of the judicial decisions sustain this statement of the law, and in *Edwards* v. *Elliott*, 21 Wall. 532, the Court said at p. 554:

> "*Shipbuilding is an occupation requiring experience and skill, and, as ordinarily conducted, is an employment on land, as much as any other mechanical employment, and men engage in the business for a livelihood just as they do in other mechanical pursuits and for the same purpose.* Shipwrights, unlike the seamen, have their homes on the land, and not on the seas, and they are seldom ship owners, and not more frequently interested in commerce and navigation than other mechanics. *Ships are bought and sold in the market just as ship timber, engines, anchors, or chronometers are bought and sold, even before they are fully constructed and before they are equipped for navigation*, and no reason is perceived why a contract to build a ship, any more than a contract for the materials of which a ship is composed, or for the instruments or appurtenances to manage or control a ship, should be regarded *as maritime*."

Under these authorities and the allegations of the libel, we do not believe a cause of action is stated. The manufacture of "gasoline-propelled yachts and motor boats" is a business conducted on land and is no more subject to the risks and perils of the sea than is the business of manufacturing "ship timbers, engines, anchors or chronometers," all of which are used in the construction of ships and vessels. Unless the courts are prepared to extend the Limited Liability Statutes to all those engaged in the manufacture of the equipment above mentioned, we believe the libel cannot be sustained.

III.

AT THE TIME OF ITS DESTRUCTION, THE MOTOR BOAT WAS NOT MANNED AND OPERATED BY A MASTER AND CREW OF PETITIONER. THERE IS NO LIABILITY, THEREFORE, THAT CAN BE LIMITED. THE LIBEL DOES NOT STATE A CAUSE OF ACTION.

In Paragraph 6 of the libel, page 10 of the record, it is said: "That on the 18th day of August, 1930, libelant is *informed that said A. C. F. cruiser was being operated by said H. A. Brassert on the waters of Lake Michigan*, one of the navigable waters of the United States, at a point about three miles from the shore of the United States Army Reservation known as Fort Sheridan, in the State of Illinois; that at the time and place stated said H. A. Brassert was cruising on the waters of Lake Michigan from the harbor at Milwaukee, Wisconsin, to the harbor of Wilmette, Illinois, and from causes unknown to said American Car and Foundry Company an explosion is alleged to have occurred midship and near the motors of said cruiser; that your libelant is informed that said explosion was followed by fire. That said A. C. F. cruiser burned to the waters edge, filled with water, was sunk and became a total wreck and loss. Said H. A. Brassert claims that he was burned by the flames and as a result thereof received injuries alleged to be serious and permanent. Said H. A. Brassert and two other persons with him (whose names and whose injuries, if any are unknown to the libelant) in said A. C. F. cruiser at the time and place stated are alleged to have jumped into the waters of Lake Michigan with life belts and were rescued by a seaplane from Great Lakes Naval Training Station, on the coast of Lake Michigan, Great Lakes, Illinois."

Nowhere in the libel is it alleged that the motor boat was in charge of a master and crew as servants and agents of petitioner at the time of its destruction. In fact, it cannot be truthfully so alleged, since the motor boat at the time of its destruction was in the possession of respondent who was operating it as alleged in the foregoing paragraph.

The sufficiency of the libel was excepted to on the grounds, among others, "9. That it does not disclose that libelant exercised due care and diligence in selecting a competent master and crew for said motor boat 'Orion.' 10. That it does not disclose that the motor boat 'Orion' was properly officered and equipped at and before its destruction by explosion and fire as therein alleged. 13. That it does not disclose facts sufficient to justify limiting the liability of libelant. 14. That it does not disclose that a court of admiralty has jurisdiction of the subject matter of this proceeding (R. 17)."

The only liability which may be limited under the statutes is the imputed liability of the ship owner. In 24 R. C. L. 1395, the rule is stated as follows:

> "The limited liability acts were intended by Congress to reduce only the imputed liabilities of vessel owners. *It leaves the owner liable for his own fault, neglect, and contracts, and is not applicable, for instance, to a warranty of seaworthiness contained in a charter party. It cannot be invoked if the liability or loss occurs with the owner's privity or knowledge.* This qualification refers to fault or knowledge personal to him, as distinguished from the negligence or misconduct of his agents, employees or co-owners, without his knowledge or participation."

Butler v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 549, was a proceeding to limit liability in which it was contended the statute did not apply to cases of personal injuries and death. This contention was not sus-

tained. In disposing of the case, the court said at p. 549:

> "If we look at the ground of the law of limited responsibility of ship-owners, we shall have no difficulty in reaching the conclusion that it covers the case of injuries to the person as well as that of injuries to goods and merchandise. *That ground is that for the encouragement of shipbuilding and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge.*"

Richardson v. *Harmon*, 222 U. S. 96, was a proceeding to limit liability for damages to a bridge. It was contended the bridge was a land structure and the tort therefore non-maritime, and one over which admiralty had no jurisdiction. This contention was sustained by the District Court, the libel was dismissed and an action to recover at common law which had been previously instituted was allowed to proceed. The judgment of the District Court dismissing the libel to limit liability was reversed, however, on the ground that the Act of 1884 (Section 189, Title 46, U. S. C. A.) permitted limitation of liability by the ship-owner for a non-maritime tort. In the opinion of the Court, it is said at p. 106:

> *"Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts."*

Pendleton v. *Benner Line*, 246 U. S. 353, 356, was a libel by the Benner Line against Pendleton Brothers upon a charter party purporting to be made between "Pendleton Bros., agents of the schooner 'Edith Olcott'" and the libelant. It was contended the schooner was unseaworthy at the beginning of the voyage in con-

sequence of which she sank and her entire cargo was lost. One of the Pendleton brothers, who signed the firm name to the charter party, was held liable, but entitled to the statutory limitation of liability. Act of June 26, 1884, c. 121, sec. 18, 23 Stat. 57. (Section 189, Title 46, U. S. C. A.) 210 Fed. Rep. 67. The Circuit Court of Appeals, however, held the statute did not apply. (217 Fed. 497; 133 C. C. A. 349.) This Court held that the charter party was Pendleton's personal act to which the Limited Liability Statutes did not apply. The Court, speaking through Mr. Justice Holmes, said at p. 356:

> "On the proposition that the petitioner is entitled to limit his liability under the Act of 1884 it is urged that the act is an absolute limit, irrespective of privity or knowledge, in regard to contracts as well as torts, and that this contract, if it bound the petitioner at all, did so only as an indirect result of its execution. The last point hardly is intelligible. The petitioner signed the charter with the name Pendleton Brothers, which included himself, and apart from the fact that although described as agents the Pendleton brothers purport to be contracting parties, if we look only to the principals the petitioner was one of them as part owner of the vessel. The contract was between human beings and the petitioner by his own act knowingly made himself a party to an express undertaking for the seaworthiness of the ship. That the statute does not limit liability for the personal acts of the owners done with knowledge is established by *Richardson* v. *Harmon*, 222 U. S. 96. *It was said in that case, p.* 106, *that section* 18 *leaves the owner 'liable for his own fault, neglect and contracts.' The principle was held to apply to contracts less personal than this in Great Lakes Towing Co.* v. *Mill Transportation Co.*, 155 Fed. Rep. 11, *and The Loyal*, 204 Fed. Rep. 930. *We are not disposed to disturb the very strong and deliberate intimations of Richardson* v. *Harmon in their application to the present case. It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was*

wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach whether he was to blame for it or not.''

This proposition is self-evident. If, at the time of its destruction, the motor boat was not being operated by petitioner's servants and agents, then there is no imputed liability and no liability to limit under the statutes in question. The only liability involved is that arising out of the alleged negligence of petitioner in the construction equipment and inspection of the motor boat. That is the gravamen of respondent's action against petitioner now pending on the common law side of the United States District Court, and we most earnestly contend that such liability cannot be limited.

CONCLUSION.

On the facts and the law of the case we conclude that at the time the motor boat was destroyed petitioner was not its ''owner'' within the meaning of the law limiting the liability of shipowners; that the law of limited liability does not extend to those engaged solely in the manufacture of ''gasoline-propelled yachts and cruisers'' or other vessels; and that since, at the time of its destruction, the motor boat was not in the possession or under the control of petitioner's agents and/or servants, there is no imputed liability and therefore no liability to limit. It is respectfully submitted that the petition should be denied.

Roy O. West,
Percy B. Eckhart,
Lewis C. Jesseph,
Proctors for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 623

AMERICAN CAR AND FOUNDRY COMPANY,
A CORPORATION,
Petitioner,

vs.

H. A. BRASSERT,
Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

ROY O. WEST,
PERCY B. ECKHART,
WILLIAM ROTHMANN,
LEWIS C. JESSEPH,
Proctors for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 816 WEST JACKSON, CHICAGO

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SUPPLEMENTAL BRIEF FOR RESPONDENT.

SUMMARY OF ARGUMENT.

I.

AT THE TIME THE MOTOR BOAT WAS DESTROYED, PETITIONER WAS NOT ITS OWNER WITHIN THE MEANING OF THE WORD "OWNER" AS USED IN THE UNITED STATES STATUTES LIMITING THE LIABILITY OF SHIPOWNERS.

"G" *The Milwaukee*, 48 F. (2d), 842, does not support petitioner's contention. In that case vendor remained in possession of the car ferry after the contract of sale, and was operating the ferry at the time of the accident.

"H" A charterer who has possession and control of

the vessel and hires a master and crew, although not an owner, is nevertheless liable for the torts of the ship. Under such circumstances, the general owner is not liable since the vessel is not being operated by his agent or for his account.

II.

THE UNITED STATES STATUTES LIMITING THE LIABILITY OF "OWNERS" DO NOT APPLY TO ONE ENGAGED SOLELY IN THE MANUFACTURE OF GASOLINE-PROPELLED YACHTS AND CRUISERS OR OTHER VESSELS.

"A" Summary the same as in original brief, p. 7.

"B" Prior to launching, a ship is a "mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house * * *." The Limited Liability Act was not passed to protect the builder of a land structure.

III.

AT THE TIME OF ITS DESTRUCTION, THE MOTOR BOAT WAS NOT MANNED AND OPERATED BY A MASTER AND CREW OF PETITIONER. THERE IS NO LIABILITY, THEREFORE, THAT CAN BE LIMITED. THE LIBEL DOES NOT STATE A CAUSE OF ACTION.

Sec. 187, Chap. 46, U. S. C. A., specifically provides that the liability of the master and crew shall not be affected by the preceding sections limiting the liability of the shipowner. The shipowner is liable for his own negligence and contracts, and liable to the extent of the ship and freight for the negligence and misconduct of the master and crew. He is relieved of liability only for the negligence of the master and crew beyond his interest in the ship and freight.

ARGUMENT.

I.

AT THE TIME THE MOTOR BOAT WAS DESTROYED, PETITIONER WAS NOT ITS OWNER WITHIN THE MEANING OF THE WORD "OWNER" AS USED IN SECTION 183, TITLE 46, U. S. C. A. AND OTHER UNITED STATES STATUTES LIMITING THE LIABILITY OF SHIPOWNERS.

For Points "A" to "F" incl. see original brief, pp. 9 to 18 incl.

"G" *cont'd. The Milwaukee*, 48 F. (2d) 842, is cited by petitioner to sustain its contention that it was the owner of the motor boat within the Limited Liability Act. We believe the case holds quite to the contrary.

The facts of the case were that for a number of years the Car Ferry Company, a Wisconsin corporation, had been operating a car ferry at Milwaukee. In December, 1928, it entered into an agreement with the Grand Trunk which recited that "The Car Ferry Company, for the considerations hereinafter mentioned, hereby sells, assigns and transfers to the Grand Trunk all its physical and other assets, including said car ferries, * * *."

The agreement further provided that it and all its provisions were subject to the approval of the Interstate Commerce Commission "as to all or such parts thereof as may be within the jurisdiction of that Commission * * *." In the meantime, the Car Ferry Company continued in possession of the car ferry and was operating it when the accident occurred. It was its liability for the damage resulting from such accident which the Car Ferry Company sought to limit.

The facts, therefore, are just the reverse of the facts in this case. There, the vendor party was in possession and control of the car ferry and was operating it at the time of the accident. Here, the vendor had parted with the possession and control of the motor boat, and the vendee was operating and in full control of it at the time of the accident.

In discussing the meaning of the word "owner" in the Limited Liability Act, the court said at page 842:

> "The judicial history of the act demonstrates that the question of ownership has been tested out, not by rigid inquiry respecting the muniments of title showing ownership to be absolute and unreserved, nor upon the mere form of transactions involving an interest in a vessel. Rather is the inquiry directed to the relationship of one asserting himself, or charged to be, the owner with a view of ascertaining whether the relationship, whatever it is found to be, might reasonably furnish ground upon which a claim of *liability for damage could be asserted.*"

Speaking of the decision of this court in *Flink* v. *Paladini*, 279 U. S. 59, the court, in The Milwaukee case, said at page 842:

> "That case seems to indicate that whether or not one is to be deemed as 'owner' depends largely upon the possibility that he may be subjected to a liability which ordinarily is assertable against one having, or claiming to have, proprietorship or dominion over the subject of the proceeding. It negatives the thought that 'owner' of, or to 'own' a vessel means the situs of full title, interest, or dominion, and that nothing else is within the definition of the right or the range of the statute."

This case clearly indicates that the real test of ownership for the purposes of the Limited Liability Act, is one of "proprietorship or dominion" over the vessel under such circumstances as to create liability. Applying this test, petitioner was not an owner. It was not in pos-

session of the motor boat at the time of the accident; neither had it any control or dominion over the boat of any kind whatsoever. It could not be held liable for the "embezzlement, loss or destruction * * * of any property, goods or merchandise shipped or put on board such" motor boat.

"H" A charterer who mans, victuals and navigates the vessel is deemed the owner for the purposes of the Limited Liability Act. It is so provided by Section 186, Title 46, U. S. C. A. and such was the law before the statute was passed.

24 R. C. L. 1108, 1109.

Marcardier v. *The Chesapeake Insurance Company*, 8 Cranch, 39, 49.

Sturgis v. *Boyer*, 24 How. 110, 124.

Reed v. *United States*, 11 Wall. 591, 600-601.

Thorp v. *Hammond*, 12 Wall. 408, 415-416.

The Barnstable, 181 U. S. 464, 468.

United States v. *Neptune Line*, 12 F. (2d) 568, 569.

In re Reichert Towing Line, 251 Fed. 214, 217.

Walker v. *Boston Insurance Company*, 14 Gray, (Mass.) 288, 294-295.

Section 186, Title 46, U. S. C. A., taken from the Act of March 3, 1851, (Sect. 4286 R. S.) is as follows:

> "The charterer of any vessel, in case he shall man, victual, and navigate such vessel at this own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; *and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.*"

The general rule governing the liability of the charterer of a vessel is stated in 24 R. C. L. 1108, as follows:

"A charterer who is owner for the voyage or serv-

ice stipulated assumes in a large measure the customary rights and liabilities of vessel owners in relation to third persons who have dealt with him or with the ship. He, and not the general owner, is usually liable for repairs and supplies ordered for the vessel, and for the other expenses of the voyage, including the wages of seamen *and the vessel's torts.* The general owner is not liable in such cases, because the *vessel is not being operated by his agents or for his account.*"

It is further said at page 1109:

"The charterer of a demised vessel, who as owner pro hac vice appoints and controls the master and crew, *is exclusively liable for their contracts and torts, since they are his agents and not those of the general owner.*"

In *Marcardier* v. *The Chesapeake Insurance Co.*, 8 Cranch, 39, it is said at page 49:

"A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. Such is understood to have been the case of *Vallejo* v. *Wheeler*, Cowp. 143. But where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership; such was the case of *Hooe & Co.* v. *Groverman*, in this court, 1 Cr. 214. In the first case, the general freighter is responsible for the conduct of the master and mariners during the voyage; in the latter case, the responsibility rests on the general owner."

In *Reed* v. *United States*, 11 Wall. 591, it is said at page 600:

"Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the

exclusive possession, command, and navigation of the vessel for the stipulated voyage."

In *Sturgis* v. *Boyer*, 24 How. 110, 124, and *The Barnstable*, 181 U. S. 464, 468, the same rule of liability is announced and applied.

Section 186, Title 46, U. S. C. A., and these cases, clearly demonstrate that the "general owner" or the owner of the bare legal title, is not necessarily the "owner" under the Limited Liability Act. They also show that the liability subject to limitation is that arising out of the navigation or operation of the vessel. They indicate that a person who is not charged with responsibility for the operation or navigation of the vessel at the time the accident occurred, can not limit liability. Such person is not the "owner" within the meaning of the statute.

As the Circuit Court of Appeals well said in its opinion (R. 36) "It must be borne in mind that appellee's cause of action is not based on appellant's ownership. Appellant is not sued as an owner, but as a manufacturer or builder, and the gist of the action is appellant's direct negligence in construction, equipment, and inspection, a failure of duty which, so far as liability is concerned, is in no way connected with maritime enterprises or with appellant's ownership."

II.

THE UNITED STATES STATUTES LIMITING THE LIABILITY OF "OWNERS" DO NOT APPLY TO ONE ENGAGED SOLELY IN THE MANUFACTURE OF GASOLINE-PROPELLED YACHTS AND CRUISERS OR OTHER VESSELS.

This point is found at page 24 of our original brief.

"A" In addition to the cases cited in our original

brief holding that the Limited Liability Act was passed to promote shipping or maritime commerce, we respectfully direct the court's attention to the following:

United States v. *Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, 212 Fed. 40, 44.

Simpson v. *Story*, 145 Mass. 497, 498-499.

Chamberlain v. *The Western Transportation Company*, 44 N. Y. 305, 307-308.

Baird v. *Daly*, 57 N. Y. 236, 250.

Carroll v. *Staten Island Railroad Co.*, 58 N. Y. 126, 142.

These cases deal in some respects with the Limited Liability Act of 1851, either before or after its amendment in 1884 and 1886. The light they throw upon the questions for determination may be of interest here.

United States v. *Hamburg, Etc.*, 212 Fed. 40, was a proceeding involving the right of a shipowner to limit liability against a claim of the United States. At page 44 of the opinion the court said:

> "The Limited Liability Act was passed for the purpose of putting American shipping upon an equality with that of other maritime nations, and also because it was believed to be of great importance to the country that our maritime commerce should be encouraged and extended. Mr. Justice Bradley, in *Norwich Co.* v. *Wright*, 13 Wall. 104, 20 L. Ed. 585, in giving the reasons which led to the passage of the act, pointed out that:
>
> "'The great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. * * * The public interests require the investment of capital in shipbuilding, quite as much as in any of these enterprises.'
>
> "*The public benefit which was to be derived from the upbuilding of the shipping interests was the pur-*

pose of the act and the only proper justification for its enactment. It is most important that this fact be kept in mind in any attempt to construe the law."

Simpson v. *Story*, 145 Mass. 497, was an action to recover for repairs done and supplies furnished a fishing schooner owned by defendants in equal parts. Story alone defended and requested an instruction under the Limited Liability Act of 1884 (Sec. 189, Chap. 46, U. S. C. A.) which was refused on the ground that the act did not apply to fishing vessels. In discussing the object of the act, and the prior legislation with reference to limited liability, the court said at page 498:

"Looking at the statute now under consideration, U. S. St. of June 26, 1884, c. 121, sec. 18, in this manner, it appears that it was not the design of Congress to include fishing vessels within its provisions. Its title is, 'An act to remove certain burdens on the American merchant marine, and encourage the American foreign carrying trade and for other purposes.' The object of the prior legislation which was amended, as well as of the act in question, was to promote the building of ships, and to encourage persons engaged in the business of navigation, with special reference to the foreign carrying trade; so that American vessels might enter into this trade in competition with foreign vessels, and on more nearly the same terms. See *Moore* v. *American Transportation Co.*, 24 How. 1; *Walker* v. *Transportation Co.*, 3 Wall. 150. This is shown by the whole history of the legislation, and by the course of the discussions in Congress. See Cong. Record, 48th Congress. American vessels were subject to burdens which foreign vessels were free from; and all the other sections of the statute had reference to the removal of such burdens. Section 18 was not in the original bill introduced in the House of Representatives, but it is found in substance in a bill introduced in the Senate, which proceeded concurrently with that in the House; and it was retained in the report of a joint committee of conference. Prior statutes had established an exemption or limitation of responsibility for losses by fire, embezzlement, and other-

wise, but they did not include any exemption in respect to debts; and similar limitations existed in foreign countries."

Chamberlain v. *The Western Transportation Company*, 44 N. Y. 305, was an action to recover the value of personal baggage shipped on board the propeller Racine, between Detroit and Buffalo. Defendant sought to limit its liability under the Limited Liability Act, but it was contended by plaintiff that personal baggage was not "goods or merchandise" within the meaning of such act. In disposing of the case, the court briefly relates the historical origin of the law at page 307:

"This common law liability of carriers by water was at an early day limited, in England, by the statutes of 7 Geo. 2, C. 15; 26 Geo. 3, C. 86 and 53 Geo. 3, C. 159. The object of these statutes, as expressed in the preamble to one of them, was 'to promote and increase the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein.' By these statutes the parliament exempted shipowners from liability in several cases of loss, and among them, loss by fire. These statutes were doubtless passed to place English shipowners upon the same footing with the shipowners of the continental nations of Europe, where the extreme rigor of the common law had not been applied to carriers by water. *Moore* v. *American Transportation Company*, 24 How. U. S., 1; Holt's Law of Shipping, 401; Abbott on Shipping, 264.)

"The common law rule remained in force in this country until an act was passed by congress, on the 3rd day of March, 1851 (1 Brightly's Dig. 834), entitled 'An act to limit the liability of shipowners and for other purposes,' which embodies most of the provisions of the English statutes above referred to. This act is supposed to have been passed in consequence of the decision in 6 Howard, *supra*, holding the New Jersey Steam Navigation Company liable for goods lost by fire upon the Lexington, burned upon Long Island Sound. (*Walker* v. *The Transportation Co.*, 3 Wallace, 150.) The object of this

statute, as stated by Justice Caton, in 24 Howard, *supra*, and as appears from the debates in congress at the time of its passage (23 Congressional Globe, 713-718) *was to place our commercial marine on an equal footing with that of Great Britain, so that the increase of the number of ships and the navigation of them might be equally encouraged.*"

Baird v. *Daly*, 57 N. Y. 236, was an action to recover damages resulting from the unskillful management of a tug engaged in towing a scow loaded with cattle across the St. Lawrence River. It was contended that the Limited Liability Act of 1851 ousted the state court of jurisdiction. This contention was denied. In deciding the case, the court commented as follows at page 250:

"The act of 1851 is founded on a great rule of public policy. It was passed in order to encourage the investment of capital in ships. The main intent of Congress was to introduce into the law of shipping the principle of 'limited liability,' which is such a marked element in the law of corporations, distinguishing them from the usual individual or partnership responsibility of owners. The ship-owner must act through agents who might, under the ordinary rules of law applicable to agency, subject him to unlimited liability. The statute, for his protection, allows him to put at risk a limited amount of his capital, as a stockholder in a manufacturing company may do by the general rules of law governing corporate stock."

Carroll v. *The Staten Island Railroad Co.*, 58 N. Y. 126, was an action against a carrier of passengers by water to recover damages for personal injuries caused by the explosion of the ship's boiler. Commenting upon the Act of 1851, the court said at page 142:

"The act of March 3, 1851 (9 Stat. at Large, 635), to limit the liability of ship-owners, etc., does not aid the defendant. That act was passed for the encouragement of American ship-building and to enable American ship-owners to compete, in the carrying of goods, with English ship-owners, who enjoyed

> under English statutes the same exemptions from liability which were extended to the owners of American vessels by the act of 1851."

It will be observed that in all these cases in stating the purpose of the Limited Liability Act, emphasis is placed upon the upbuilding of the "commercial marine," and the "shipping interests"; to "encourage the foreign carrying trade" and to "introduce into the law of shipping the principle of 'limited liability'."

We have not found a case, however, holding or inferring, that the purpose of the act was to limit the liability of manufacturers of gasoline-propelled motor boats and cruisers, in order to promote water sports and recreation. The rights of the citizen to hold the manufacturer liable for his negligence and the negligence of his servants and agents have not been disturbed by these statutes.

"B" That a contract to build a ship is not maritime is abundantly sustained by the authorities. In addition to the cases referred to in our original brief, we cite the following:

> *Tucker* v. *Alexandroff*, 183 U. S. 424, 437-438.
> *The Winnebago*, 205 U. S. 354, 363.
> *North Pacific Steamship Co.* v. *Hall Bros. Co.*, 249 U. S. 119, 126-127.
> *The Thames Towboat Co.* v. *The Schooner Francis McDonald, Etc.*, 254 U. S. 242, 244-245.

North Pacific S. S. Co. v. *Hall Bros. Co.*, 249 U. S. 119, was a proceeding in admiralty to recover for work and labor, services rendered and materials furnished in repairing the steamship Yucatan. The question for decision was one of admiralty jurisdiction. In the course

of the opinion, among other things, it is said at pages 126-127:

> "It is settled that a contract for building a ship or supplying materials for her construction is not a maritime contract. *People's Ferry Co.* v. *Beers*, 20 How. 393; *Roach* v. *Chapman*, 22 How. 129; *Edwards* v. *Elliott*, 21 Wall. 532, 553, 557; *The Winnebago*, 205 U. S. 354, 363. In the case in 20 Howard the court said (p. 402): 'So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land, to be performed on land.' But the true basis for the distinction between the construction and the repair of a ship, for purposes of the admiralty jurisdiction, is to be found in the fact that the structure does not become a ship, *in the legal sense, until it is completed and launched.* 'A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—*as distinctly a land structure as a house, and subject to mechanic's liens created by state law enforcible in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction.*' *Tucker* v. *Alexandroff*, 183 U. S. 424, 438."

If, as stated, until launched a ship *"is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house,"* then it certainly cannot be successfully contended the limited liability statutes apply to a liability arising solely out of a land activity. Petitioner's liability in the case at bar arises solely from its negligent act on land in the manufacture and assembly of the motor boat long before it was launched in Lake Michigan.

If a vessel, until launched, is as "distinctly a land structure as a house," and the liability arising out of the

building of the vessel may be limited, why not limit the liability which may arise out of the *building* of the house? What reason exists for the distinction, especially where the builder of the vessel does not navigate her for any purpose whatsoever?

Clearly, the statute was not passed to limit the liability of the builder of vessels where the liability arises out of negligence in the building, but was passed to limit the liability of the "owner of any vessel for any embezzlement, loss or destruction * * * of any property, goods or merchandise, shipped or put on board such vessel * * *." A consideration of the statute itself refutes the idea that the law applies to the petitioner under the facts and circumstances of the case.

III.

AT THE TIME OF ITS DESTRUCTION, THE MOTOR BOAT WAS NOT MANNED AND OPERATED BY A MASTER AND CREW OF PETITIONER. THERE IS NO LIABILITY, THEREFORE, THAT CAN BE LIMITED. THE LIBEL DOES NOT STATE A CAUSE OF ACTION.

This point is found at page 31 of our original brief.

We cite the following additional authorities to this point of the original brief:

Section 187, Title 46, U. S. C. A.

24 R. C. L. 1397.

Walker v. *The Transportation Co.* 3 Wall. 150, 153.

Railroad Company v. *Lockwood*, 17 Wall. 357, 360-361.

Liverpool Etc. Steam Co. v. *Phenix Ins. Co.* 129 U. S. 397, 439-440.

Craig v. *Continental Insurance Co.* 141 U. S. 638, 646.

Section 187, Title 46, U. S. C. A., reads:

> "Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel."

This section was a part of the Act of March 3, 1851.

It is evident from this section of the statute that by the preceding sections the shipowner's liability for the acts of the master and crew was limited, but that the liability of the master and crew for their own acts was not affected. It is the imputed liability of the owner for the acts of the master and crew which is limited by Section 183 and other sections. The shipowner and the master and crew remain liable for their own faults and neglect.

In 24 R. C. L. 1397, the rule is thus stated:

> "The limited liability statutes leave a vessel owner liable without limit for his own negligence and contracts, and liable to the extent of the ship and freight for the negligence or misconduct of the master and crew."

These authorities clearly show that it is the imputed liability of the shipowner for the negligence of the master and crew that is limited, as we contend in our original brief.

Walker v. *The Transportation Co.* 3 Wall. 150, was a libel *in personam* to recover damages for the loss of a cargo of wheat shipped from Chicago to Buffalo and destroyed by fire. It was contended that the fire did

not occur through the negligence or misconduct of the respondent or its servants or agents. In the decision it is said at page 153:

> "If, however, there could be any doubt upon the construction of this section (Section 183) standing alone, it is removed by a consideration of the sixth section (Section 187), which, in terms, saves the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud, or other malversation. *This implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so;* and that is stated to be their negligence and fraud."

In *Liverpool Etc. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, which was a libel in admiralty *in personam* to recover damages for the loss of goods shipped on board a steamer bound from New York to Liverpool, it was said at page 439:

> "By the common law of England and America before the Declaration of Independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many States of the Union, common carriers could not stipulate for immunity for their own or their servants' negligence. The English Railway and Canal Traffic Act of 1854, declaring void all notices and conditions made by those classes of common carriers, except such as should be held by the court or judge before whom the case should be tried to be just and reasonable, was substantially a return to the rule of the common law.
>
> "The only important modification by the Congress of the United States of the previously existing law on this subject is the act of 1851, to limit the liability of ship-owners, (Act of March 3, 1851, c. 43; 9 Stat. 635; Rev. Stat. secs. 4282-4289,) and that act leaves them liable without limit for their own negligence, and liable to the extent of the ship and

freight for the negligence or misconduct of their master and crew."

Can there be any doubt of the soundness of our position on this point? No authorities are cited by petitioner to the contrary, and we have found none.

The relation of master and servant did not exist between petitioner and respondent. No such relation is alleged in the libel, and none arose out of the conditional sale agreement.

The liability which petitioner seeks to limit is that of the manufacturer of motor boats for negligence in manufacturing, equipping and inspecting. Certainly the Limited Liability Act was not designed to affect such liability. To limit such liability would not promote shipping nor encourage the development of the merchant marine. The right of the citizen to hold the master liable for the negligence of the servant which is the familiar law of respondeat superior, should not be taken away by statutory construction. If limited in any way, it should be only by legislation, plain and unambiguous in every respect and clearly designed to accomplish that specific purpose.

Roy O. West,
Percy B. Eckhart,
William Rothmann,
Lewis C. Jesseph,
Proctors for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 623.—October Term, 1932.

American Car and Foundry Company, Petitioner, *vs.* H. A. Brassert.	On Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

[May 8, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner, American Car and Foundry Company, a manufacturer of gasoline propelled yachts and cruisers, made a conditional sale of a cruiser to respondent. While respondent was cruising in the vessel on the waters of Lake Michigan an explosion occurred midship, fire followed, and the vessel became a total wreck and in consequence lay sunken and worthless. Alleging these facts, that respondent and other persons with him on the vessel had been injured, and that respondent's personal effects, as well as the vessel, its machinery, equipment and supplies, were a total loss, and that all the alleged injuries and damages were occasioned and incurred without its privity or knowledge, petitioner filed this libel against respondent seeking limitation of liability under the Act of March 3, 1851, c. 43, sec. 3. 46 U. S. C. 183. Respondent filed exceptions upon the ground that the libel did not disclose that libellant was the owner of the vessel or engaged in maritime commerce, or any facts sufficient to show that libellant was entitled to the limitation. The District Court dismissed the libel and the Circuit Court of Appeals affirmed the decree. 61 F. (2d) 162. This Court granted certiorari, 288 U. S. —.

The libel disclosed that the sole relation of petitioner to the cruiser was that of manufacturer and vendor under a contract of conditional sale. Respondent gave his order for the cruiser to be delivered on the terms stated and subject to warranty against "defects in workmanship and material" which by its terms was limited to replacement of parts. The order was followed by a "conditional sale agreement", by which respondent acknowledged

receipt of the boat in good condition and which provided for the payment of the balance of the purchase price within ninety days after delivery and that, until such payment or tender, title to the boat should remain in the seller. Subject to the conditions of the agreement, the purchaser was entitled to the possession and use of the boat with the right on the part of the seller to retake it and its equipment in case of the purchaser's default. The purchaser was required to keep the boat insured with full marine coverage, to pay all taxes and charges, to comply with all applicable laws, and to hold the seller harmless from all "liability, claim, demand, cost, charge and expense in any way imposed upon or accruing to seller" by reason of the use or operation of the boat. The libel alleged that the vessel when delivered to respondent was "sturdy, safe and seaworthy". The cause of the accident, except as above stated, is not shown. It appears to have occurred prior to any default on the part of respondent and while he was operating the vessel on his own behalf. The libellant, while proceeding directly against respondent, sought limitation against all claims.

The statute[1] limiting the liability of shipowners was enacted to encourage investments in ships and their employment in commerce. That purpose embraced, as petitioner insists, the promotion of shipbuilding, but it was not concerned with construction as a mere enterprise of manufacture, which itself was not a maritime activity (*People's Ferry Co.* v. *Beers*, 20 How. 393, 402; *Edwards* v. *Elliott*, 21 Wall. 532, 554, 557; *Thames Company* v. *The Francis McDonald*, 254 U. S. 243, 244), but with the promotion of commerce and the encouragement "of persons engaged in the business of navigation", to the end that the shipping interests of this country might not suffer in competition with foreign vessels. *Moore* v. *American Transportation Co.*, 24 How. 1, 39; *Norwich Company* v. *Wright*, 13 Wall. 104, 121; *The Main* v. *Williams*, 152 U. S. 122, 131; *Evansville Company* v. *Chero Cola Co.*, 271 U. S.

[1] "The liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending". R. S. 4283, 46 U. S. C. 183.

19, 21; *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 214; *Flink* v. *Paladini*, 279 U. S. 59, 62. The statute embodied the principle of the general maritime law that shipowners should not "be liable beyond their interest in the ship and freight for the acts of the master and the crew done without their privity or knowledge". *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, 549. The liability thus limited is an imputed liability; it is a liability imputed by law by reason of the ownership of the vessel. For his own fault, neglect and contracts the owner remains liable. *Richardson* v. *Harmon*, 222 U. S. 96, 103, 106; *Pendleton* v. *Benner Line*, 246 U. S. 353, 356.

Petitioner retained title solely for the purpose of securing the purchase price of the vessel, and prior to default in payment, petitioner had no control over the vessel's operation. Petitioner did not man or operate her, and had no right to do so. For all purposes of use in navigation the vessel belonged to respondent. In these circumstances, petitioner was not liable as owner for acts of respondent or for those of the master and crew. It is well settled[2] that a mortgagee out of possession, and not exercising authority, is not answerable for the acts of the master or other agent of the ship. See *Morgan* v. *Shinn*, 15 Wall. 105, 110; *McIntyre* v. *Scott*, 8 Johns. 159; *Macy* v. *Wheeler*, 30 N. Y. 231; *Brooks* v. *Bondsey*, 17 Pick. 441; *Davidson* v. *Baldwin*, 79 Fed. 95; *Calumet & Hecla Mining Co.* v. *Equitable Trust Company*, 275 Fed. 552; Parsons on Shipping and Admiralty, 129, *note*; Abbott, Merchant Ships and Seamen, 14th ed., p. 55. The same is true of a vendor who retains title as security for the payment of the purchase price. See *Philips* v. *Ledley*, 1 Wash. C. C. 226; Fed. Cas. No. 11,096; *Wendover* v. *Hogeboom*, 7 Johns. 308; *Leonard* v. *Huntington*, 15 Johns. 298; *Thorn* v. *Hicks*, 7 Cow. 697; *Jones* v. *Pitcher*, 3 Stewart, 135; *Hemm* v. *Williamson*, 47 Ohio St. 493; *The Boise Penrose*, 22 F. (2d) 919, 920; *The John E. Berwind*, 56 F. (2d) 13. The principle, generally recognized, was thus emphatically stated in *Thorn* v. *Hicks*, *supra:* "The mere circumstance of the naked legal title to the vessel" remaining in the vendors "to secure the purchase money for which she had been

[2]Compare Jackson *v.* Vernon, 1 H. Bl. 114; Westerdell *v.* Dale, 7 Term Rep. 306; Mitcheson *v.* Oliver, 5 El. and Bl. 419; Tucker *v.* Buffiington, 15 Mass. 477.

sold, unquestionably would not render them liable as owners, on the contracts of the master, or for the consequences of his negligence and unskilfulness".

What, then, is the liability which petitioner seeks to limit? It is manifestly not a liability imputed to petitioner as shipowner. With respect to respondent, the mere fact that petitioner retained the legal title to the vessel, in order to secure the payment of the remainder of the price, neither created liability for the injury alleged to have been sustained on account of the explosion nor conferred immunity. If such liability existed, it arose not because petitioner reserved title, while delivering possession and control of use, but because it was manufacturer and vendor. The question of liability would be determined with reference to the obligations which were expressly assumed by the vendor, or were inherent in the transaction, irrespective of the title retained as security. Similarly, as to other persons who are alleged to have suffered injury from the accident—the possible claimants described in the libel—petitioner's liability, if any, had no relation to any responsibility of petitioner as holder of the naked title, but would depend upon petitioner's conduct as maker of the vessel, that is, upon the question whether in the circumstances petitioner could be held guilty of actionable neglect in its manufacture. See Bohlen, "Studies in the Law of Torts", pp. 109 *et seq.*; *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382. That question is not before us. Whatever liability there may be in that aspect, either to respondent or to others, it is not a liability falling within the policy and purview of the Act of Congress limiting the liability of shipowners.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.